TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 720.

I. TUCKER BURR ET AL., PARTNERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF PARTINSON & BURR, APPELLANTS,

vs.

THE CITY OF COLUMBUS, OHIO, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED NOVEMBER 22, 1913.

(26,825)

(26,825)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 739.

I. TUCKER BURR ET AL., PARTNERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF PARKINSON & BURR, APPELLANTS,

vs.

THE CITY OF COLUMBUS, OHIO, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 21, 1918.

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United States Supreme Court.

No. —.

I. Tucker Burr, Winthrop Burr, A. Lawrence Pierson, Thomas B. Gannett, Jr., Constantine Hutchins, Richard Austin, James W. Eheeler, and William J. Sturgis, Partners Doing Business under the Firm Name and Style of Parkinson & Burr, Appellants,

vs.

The City of Columbus, Ohio, a Municipal Corporation of the State of Ohio; George J. Karb, Mayor of said City; Henry L. Scarlett, City Attorney and City Solicitor of said City; James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck, and Fred P. Zimpfer, Members of the City Council of said City, Appellees.

Appeal from the United States District Court for the Southern District of Ohio, Eastern Division.

Record.

William O. Henderson, Henry J. Booth, Booth, Keating, Pomerene & Boulger, Henderson & Burr, Columbus, Ohio, Solicitors for Appellants.

Joseph S. Clark, Henry A. McCarthy, Philadelphia, Pa., of Counsel for Appellants.

Henry L. Scarlett, Columbus, Ohio, Solicitor for Appellees.

David F. Pugh, Joseph A. Godown, Columbus, Ohio, of Counsel for Appellees.

1 At a Stated Term of the District Court of the United States within and for the Sixth Judicial Circuit and Eastern Division of the Southern District of Ohio, Begun and Held at the Court-rooms, in the City of Columbus, on the First Tuesday of June, Being Also the Fourth Day of That Month, in the Year of Our Lord One Thousand Nine Hundred and Eighteen, and in the One Hundred and Forty-second Year of the Independence of the United States of America.

Present: The Honorable Howard C. Hoilister, U. S. District Judge.

Among the proceedings had were the following, to-wit.

No. 106.

I. Tucker Burr, Winthrop Burr, A. Lawrence Pierson, Thomas B. Gannett, Jr., Constantine Hutchins, Richard Austin, James W. Wheeler, and William J. Sturgis, Partners Doing Business under the Firm Name and Style of Parkinson & Burr, Plaintiffs,

vs.

The City of Columbus, Ohio, a Municipal Corporation of the State of Ohio; George J. Karb, Mayor of said City; Henry L. Scarlett, City Attorney and City Solicitor of said City; James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck, and Fred P. Zimpfer, Members of the City Council of said City, Defendants.

Be it remembered that heretofore, towit, on the 16th day of September, A. D. 1918, came the Plaintiffs, by their Solicitors and filed in the Clerk's Office of said Court, their certain Bill of Com-
2 plaint in this cause, against said defendants, which said Bill of Complaint is clothed in the words and figures following, to-wit:

In the United States District Court, Southern District of Ohio, Eastern Division.

No. 106.

I. Tucker Burr, Winthrop Burr, A. Lawrence Pierson, Thomas B. Gannett, Jr., Constantine Hutchins, Richard Austin, James W. Wheeler, and William J. Sturgis, Partners Doing Business under the Firm Name and Style of Parkinson & Burr, Plaintiffs,

vs.

The City of Columbus, Ohio, a Municipal Corporation of the State of Ohio; George J. Karb, Mayor of said City; Henry L. Scarlett, City Attorney and City Solicitor of said City; James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck, and Fred P. Zimpfer, Members of the City Council of said City, Defendants.

Bill of Complaint.

To the Honorable the Judges of the United States District Court, Southern District of Ohio, Eastern Division:

The plaintiffs complain and say:

1. The plaintiff, I. Tucker Burr, is a citizen of the State of Massachusetts and resides in the City of Boston in said State; the plaintiff Winthrop Burr, is a citizen of the State of New York and resides in the City of New York in said State; the plaintiff, A. Lawrence Pierson, is a citizen of the State of New Jersey and resides in Essex Falls, Essex County in said State; the plaintiff, Thomas B. Gannett, Jr., is a citizen of the State of Massachusetts and resides in the City
3 of Manchester in said State; the plaintiff, Constantine Hutchins, is a citizen of the State of Massachusetts and resides in the City of Dedham in said state; the plaintiff, Richard Austin, is a citizen of the State of Massachusetts and resides in the City of Dover in said state; the plaintiff, James W. Wheeler, is a citizen of the State of Massachusetts and resides in the City of Newton in said state; and the plaintiff, William J. Sturgis, is a citizen of the State of New York and resides in the City of New York in said state. The said plaintiffs are partners doing business in the City of Boston, in the State of Massachusetts, under the firm name and style of Parkinson & Burr, and are the owners and holders of more than two hundred thousand dollars ($200,000.00) of the First Refunding Extension and Sinking Fund Five Per Cent. Mortgage Bonds described in paragraph 11 hereof.

2. The defendant, the City of Columbus, Ohio, is a municipal corporation duly organized under the laws of the State of Ohio; the defendant, George J. Karb, is the duly elected, qualified and acting Mayor of said City of Columbus; the defendant, Henry L. Scarlett, is the duly elected, qualified and acting City Attorney and City Solicitor

of said city; the defendant, James J. Thomas, is the duly elected, qualified and acting City Clerk of said city; the defendants, Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck, and Fred P. Zimpfer, are the duly elected, qualified and acting members of the City Council of said city; and all of said defendants are citizens of said state and all of said defendants, who are officers as aforesaid, are residents of said City of Columbus.

3. This suit is between citizens of different states, and the matter in controversy herein exceeds the sum of Three Thousand Dol-
4 lars ($3,000.00), exclusive of interest and costs.

4. The Columbus Railway, Power & Light Company is a corporation of the State of Ohio duly incorporated, organized and existing for the purpose, among others, of acquiring by purchase or lease, constructing, extending, owning, maintaining and operating by means of electricity, street railroads or interurban railroads, or both, in the City of Columbus, County of Franklin and State of Ohio, and lines of such railroads extending from said city, within, through and between the municipalities located in said county and in territory contiguous to said county, with such termini as are or may be designated in the several ordinances, resolutions and orders granting and establishing the same; and it owns and operates, among other things, a system of street railway lines in the City of Columbus, Ohio.

Since the enactment of the two ordinances mentioned in this paragraph and until the 20th day of August, 1918, said company and its predecessors in title have been operating said system of street railway lines in the City of Columbus, which system consists of more than one hundred and ten (110) miles of main track with necessary switches, turnouts and overhead construction, power houses and other necessary equipment, under two certain franchises granted by said city, towit:

(a) A franchise granted by an ordinance, entitled:

"An Ordinance, No. 17801,

Renewing to The Columbus Railway Company, for a term of twenty-five (25) years, its grants, rights, privileges and franchises, to maintain and operate its tracks and lines of street railroad upon the streets and avenues, and parts of streets and avenues, hereinafter mentioned, in the City of Columbus, Ohio, and prescribing the terms and conditions thereof, and repealing the provisions of any and all ordinances and resolutions, and parts of ordinances and resolutions, inconsistent with the terms of this ordinance,"

said ordinance having been duly passed by the City Council of
5 said city on February 4, 1901, and duly approved by the Mayor of said city on February 6, 1901, and all rights and privileges thereunder having been thereafter transferred and conveyed by said The Columbus Railway Company to said The Columbus Railway, Power & Light Company by deed dated January 29, 1914. Said franchise ordinance has been sometimes called and is

hereinafter referred to as the Blanket Franchise Ordinance, a copy of which is hereto attached, marked "Exhibit No. 1" and made a part hereof.

(*b*) A second franchise granted by an ordinance entitled:

"An Ordinance, No. 17802,

Granting permission to The Central Market Street Railway Company, its successors and assigns, to construct, operate and maintain a single or double track street railway, with necessary sidetracks, curves, turn-outs and switches in the following streets of the city of Columbus, Ohio, towit: Rich street, Fifth street, Donaldson street, Livingston avenue, Mohawk street, Reinhard avenue, Jaeger street, Hanford street, Fourth street, Hosack street, Innis avenue and Parsons avenue to the south corporation line of said City of Columbus,"

said ordinance having been duly passed by the City Council of said city on January 21, 1901, and duly approved by the Mayor of said city on January 22, 1901, and all rights and privileges thereunder having been transferred and conveyed, after foreclosure proceedings, to said The Columbus Railway, Power & Light Company under its former name of The Columbus Traction Company, by deed dated March 1, 1907. A copy of said second franchise ordinance, which is hereinafter referred to as the Central Market Franchise Ordinance, is hereto attached, marked "Exhibit No. 2" and made a part hereof.

6. In addition to said Blanket Franchise and said Central Market Franchise, certain other franchises were previously granted by said City of Columbus to predecessors in title of The Columbus Railway Company, as follows, towit:

6 On Main street, (formerly called Friend street) from High street to Rose avenue; on State street from High street to Grant avenue; thence in a northerly direction on Grant avenue to Oak street; thence on Oak street in an easterly direction to Sherman avenue, (formerly called Bruce street); on Long street from High street in an easterly direction to Mulberry street, and thence in a southerly direction on Mulberry street from Long street to Broad street; on Cleveland avenue in a northerly direction from Long street to Mt. Vernon avenue; thence in an easterly direction on Mt. Vernon avenue to Washington avenue; on West Broad street from High street to a point opposite the center of the east driveway to the Central Hospital for the Insane, (the same being the corporation line of the City of Columbus as established by ordinance of the City of Columbus, passed on or about May 18th, 1890); on Glenwood avenue in a southerly direction from Broad street to the Harrisburg pike; thence in a southwesterly direction on the Harrisburg pike to Greenlawn cemetery.

All of said last mentioned franchises were granted without limitation of time and are perpe*u*tal. They were duly and legally transferred and conveyed to said The Columbus Railway Company and by said Company duly and legally transferred and conveyed to said The Columbus Railway, Power & Light Company by the aforesaid

deed dated January 29, 1914. The streets covered by said perpetual franchises are set forth in Section 20 of said Blanket Franchise Ordinance, Exhibit No. 1, and the claim of said The Columbus Railway Company that they are perpetual is recognized by said city in said section but is not there admitted. All of the franchises mentioned in this paragraph and the last preceding paragraph were duly accepted by the grantees thereof respectively.

7. Under the terms and provisions of said Blanket Franchise Ordinance, Exhibit No. 1, the grantee and its successors and assigns were required in due course as therein provided to issue and sell, and they did issue and sell, eight tickets for twenty-five cents, and to give, and they did give, universal free transfers thereon. The issue and sale of said tickets with universal free transfers was instituted April 1, 1912, and continued until August 20th, 1918,
7 when said franchise was surrendered and cancelled by said The Columbus Railway, Power & Light Company as hereinafter stated.

8. Under the terms and provisions of said Central Market Franchise Ordinance, Exhibit No. 2, that company issued and sold eight tickets for twenty-five cents and gave universal free transfers, and continued so to do as long as it remained the owner of said franchise; and said The Columbus Railway, Power & Light Company continued the issuing and selling of eight tickets for twenty-five cents and the giving of such transfers from the time when it became the owner of said franchise until August 20th, 1918, when said franchise was surrendered and cancelled by said The Columbus Railway, Power & Light Company as hereinafter stated.

9. Said The Columbus Railway, Power & Light Company in the operation of said system of street railway lines has developed and is conducting an extensive business in the carrying of street railway passengers in said city; and, during the year 1917, averaged 234,162 car rides per day and carried on its said lines in said city a total of more than 81,819,395 passengers, for which it received approximately two and six tenths (2 6/10) cents per car ride, a person riding upon a transfer being counted as a passenger in these figures. Said The Columbus Railway, Power & Light Company, by its said street railway system, including more than 110 miles of main track, supplies the only street railway service in said City of Columbus and its suburbs, except a very limited service furnished by interurban cars running at long intervals upon certain streets. Said The Columbus Railway, Power & Light Company also supplies electricity for light and power for domestic and commercial use, and power for war and industrial purposes in said city and its suburbs. Said City
8 of Columbus and its suburbs contain a population of more than 250,000 and constitute a large industrial, manufacturing, military and railroad center in which are located numerous shops, factories and plants wherein more than 25,000 persons are now and for a long time will be employed in the manufacture of munitions, clothing and a great variety of other war materials for use directly by the United States Government and for use by those who are furnishing war supplies to and for the Government, in the pros-

ecution of the present war; also large railroad shops in which are employed many thousands of persons who are, and will for a long time continue to be, engaged in the manufacture and repair of railroad engines, cars and other equipment used and to be used by the United States Railroad Administration in its maintenance and operation of the railroad systems of the United States; also a very large Storage Depot for the storage and distribution of munitions and other supplies for Government use, at which are employed more than 2000 persons. A large majority of said employes in said shops, factories and plants, in said railroad shops and at said Storage Depot, do and must depend upon the street railway service of said The Columbus Railway, Power & Light Company as their means of transportation to and from their places of employment; and in said area is located also the Columbus Barracks in which are quartered more than 100,000 recruits per annum, who also are dependent upon said street railway service. The discontinuance or impairment of said company's street railway service would cause irreparable harm to the Government of the United States, to the City of Columbus and to all persons dependent upon said service.

9 10. Said the Columbus Railway, Power & Light Company has now invested in said street railway lines and equipment, on a conservative basis of investment and physical value, more than twelve millions of dollars. Said company and its predecessors in title have from time to time issued and sold, and there are now outstanding in the hands of bona fide holders for value, mortgage bonds in large amounts, of which the sum of approximately $8,600,000.00 are properly chargeable against its street railway property, the annual interest charge upon which is more than $400,000.00.

11. Said $8,600,000.00 of bonds mentioned in the last paragraph includes approximately $1,500,000.00 of the so-called First Refunding and Extension Sinking Fund Five Per Cent. Mortgage Bonds of said The Columbus Railway, Power & Light Company, due October 1st, 1940, and secured by the mortgage, or deed of trust, of said company executed and delivered to Girard Trust Company, Trustee, on or about the 1st day of April, 1915, and covering all of the property of said The Columbus Railway, Power & Light Company, including all of its street railway lines and other property hereinbefore referred to.

12. Said The Columbus Railway, Power & Light Company has at all times operated and managed, and is now operating and managing said system efficiently, economically, conservatively, intelligently, safely and at the lowest possible cost consistent with adequate and sufficient service to the public. Notwithstanding such operation and management, the results have shown increased and increasing costs of operation and decreased and decreasing net revenue, which said increased and increasing costs of operation and decreased and decreasing net revenue have been caused by and are the direct

10 result of the war in which the United States is now engaged.

The revenues derived from the operation of said street railway property for the twelve months ending June 30, 1918, after de-

ducting operating expenses, taxes and a proper charge for depreciation, were $301,987.00, an amount insufficient by approximately $100,000.00 to pay the interest on said $8,600,000.00 of bonds outstanding and properly chargeable against said company's street railway property.

13. During the month of June, 1918, street railway employes of The Columbus Railway, Power & Light Company demanded an increase in their wages, which said increase said company could not pay, and thereupon said employes inaugurated a strike which caused said company's service to be entirely discontinued for two days; and after some negotiations, the controversy was referred to the National War Labor Board for decision, and that Board, on July 31, 1918, rendered its decision whereby it fixed such a scale of wages for said employes that said company has been compelled to increase the wages of its street railway employes more than fifty per cent. per annum from and after July 1, 1918. Said increase in the wage account of said company will increase the operating expenses of its street railway property in the approximate sum of $560,000.00 per year, so that unless the defendants be enjoined from enforcing said rates prescribed by said ordinances, Exhibits No. 1 and No. 2, said company's gross earnings therefrom for the current year ending June 30, 1919, will fall short of paying its said operating expenses, depreciation and taxes by not less than $250,000, and there will be nothing left of said earnings with which to pay said interest charges of more than $400,000.00 or to yield any return to said company upon the value of its property employed in furnishing said
11 street railway service.

14. On the 20th day of August, 1918, said The Columbus Railway, Power & Light Company surrendered and cancelled both said Blanket Franchise and said Central Market Franchise by notification in writing addressed to the City of Columbus, Ohio, the Mayor, City Council and City Clerk of said city, a copy of which is hereto attached, marked "Exhibit No. 3" and made part hereof.

15. The rates of fare prescribed by the terms and conditions of said two franchises last above mentioned were not either before or when said franchises were surrendered and cancelled as hereinbefore stated, and would not be if longer enforced against said The Columbus Railway, Power & Light Company, sufficient to enable said company to maintain its street railway property in good order and repair and to perform its duty as a public utility, and particularly to furnish the street railway service hereinbefore in paragraph 9 set forth; the further operation of said company's street railway property at said rates of fare would be not only impracticable but impossible, both financially and otherwise, and would bankrupt said company within a short time; and the enforcement of said rates of fare would violate the Fourteenth Amendment to the Constitution of the United States, in that said rates of fare are and would be unjust, unreasonable, inadequate and confiscatory; and their enforcement would deprive the plaintiffs of their property without due process of law, and would render the further operation of all its property not only impracticable but impossible, both financially and otherwise, because the cost thereof including taxes, depreciation and

bond interest would far exceed its entire earnings received
12 from all sources, and would soon bankrupt said company as aforesaid.

In the event of the bankruptcy of said company as hereinabove set forth, claims for labor and materials furnished to said company would become a lien on said property prior to the lien of said mortgage securing plaintiffs' said bonds, the operation of said street railway lines would be impossible except through the appointment of a receiver therefor, and then only temporarily, if at all, through the issuance of receiver's certificates, which would become a lien upon the property covered by said mortgage prior to the lien of said mortgage itself, the proceeds of said certificates would be necessary to pay the deficit in said company's operating expenses, and such operation of said street railway property would impair and destroy the security of plaintiffs' said bonds, and prevent the payment of the same and the interest thereon, and ultimately make it impossible to furnish service on said street railway lines.

16. The defendants threaten to, and will, unless enjoined by this court, attempt to force said company to continue to operate its street railway property under said Blanket Franchise and said Central Market Franchise upon all of the streets of said city, including those streets covered by the aforesaid perpetual franchises, and to force it to continue to issue and sell eight tickets for twenty-five cents and give universal free transfers; and said threat of the defendants, if carried out, would compel the said company to carry passengers upon its said lines at unjust, unreasonable, inadequate and confiscatory rates, in violation of said Fourteenth Amendment to the Constitution of the United States, and to the great and irreparable harm of the plaintiffs as herein set forth.

13 17. In anticipation of a controversy between said city on the one side and the said company on the other over the right of the said company to surrender and cancel the aforesaid two franchises and its right to put into force and effect new rates of fare, the details of which are set forth in Exhibit No. 3 of this bill of complaint, the said company is giving to its passengers who pay the new rates of fare appropriate rebate checks representing the difference between the new rates of fare and those prescribed by the aforesaid two ordinances, and offers to redeem said rebate checks provided it shall be finally decided that it was not justified in adopting said new rates of fare.

18. The enforcement of the defendants or any of them of the last aforesaid two franchise ordinances, or either of them, or any attempt by them to enforce the same, would cause the plaintiffs immediate and irreparable injury, loss and damage, for which they have no adequate remedy at law.

19. This bill of complaint presents a case within the jurisdiction of this court of equity by reason of the diversity of citizenship of the parties hereto and the character of the relief herein sought by them and in further view of the controversies, confusion, risks and multiplicity of suits which would necessarily be occasioned by the resistance of said company to the enforcement of the unjust, unreasonable, inadequate and confiscatory rates of fare prescribed in

the aforesaid two franchise ordinances, and that, because of the public interests and the great number of people to be affected thereby, only a court of equity is competent to meet such an emergency and to determine once and for all and without a multiplicity of suits matters that affect not only individuals, but also the interests of the entire community in the use of the public
14 streets of the City of Columbus and in the administration of the affairs of said company, a quasi-public corporation, operating lines of street railway in said streets.

Wherefore, the plaintiffs pray:

First. That the defendants and each of them make full, direct and true answer to the matters, all and singular, herein stated and complained of, but not under oath, this being hereby waived.

Second. That the defendants and each of them, their officers, servants, employes and agents, and their respective successors in office, be temporarily restrained and enjoined, pending this suit, and, on final hearing, be forever enjoined from in any way forcing or compelling, or attempting to force or compel, said The Columbus Railway, Power & Light Company to operate its lines of street railway, or any of them, in the City of Columbus, under said Blanket Franchise Ordinance or under said Central Market Franchise Ordinance, or either of them; from in any way forcing or compelling, or attempting to force or compel, the said company to charge and collect the rates of fare prescribed by the aforesaid two franchise ordinances; from in any way enforcing, or attempting to enforce, against the said company the aforesaid two franchise ordinances, or either of them, or any provision of either of them.

That the plaintiffs may have all such other and further relief as to equity may seem meet and the nature of the case may require.

WILLIAM O. HENDERSON,
HENRY J. BOOTH,
HENDERSON & BURR,
BOOTH, KEATING, POMERENE & BOULGER,
Solicitors and Counsel for Plaintiffs.

JOSEPH S. CLARK,
HENRY A. McCARTHY,
Of Counsel.

15 STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Before me, a Notary Public in and for the Commonwealth of Pennsylvania, residing in the City of Philadelphia, personally appeared William Lilley, who, being duly sworn according to law, deposes and says that he has read the foregoing bill of complaint; that he has knowledge of the facts in said bill of complaint set forth, and that the facts therein set forth are true.

WILLIAM LILLEY.

Sworn to and subscribed before me this 13th day of September, 1918.

[SEAL.] W. EVANS SMITH,
Notary Public.

Commission expires Jan. 21, 1921.

16 EXHIBIT No. 1.

An Ordinance, No. 17801,

Renewing to The Columbus Railway Company, for a term of twenty-five (25) years, its grants, rights, privileges and franchises, to maintain and operate its tracks and lines of street railroad upon the streets and avenues, and parts of streets and avenues, hereinafter mentioned, in the City of Columbus, Ohio, and prescribing the terms and conditions thereof, and repealing the provisions of any and all ordinances and resolutions, and parts of ordinances and resolutions, inconsistent with the terms of this ordinance.

(City Record Book 11, Page 524.)

Preamble.

Whereas, The Columbus Railway Company is the owner of and now engaged in operating certain lines of street railroad in the City of Columbus, Ohio, being the lines heretofore owned and operated by it, as well as those purchased from The Columbus Central Railway Company, and being the same lines enumerated in the title hereof; and

Whereas, Said several lines of street railroad owned by said The Columbus Railway Company, are held and operated by it under the authority of ordinances passed at various times, and for various periods, and containing various and inconsistent conditions as to the operation of lines of street railroad thereunder, and so limiting the franchises thereunder granted that they expire at different dates up to and including the year 1917; and

Whereas, In order to improve the service rendered by the said The Columbus Railway Company, it is desired that the several lines of street railroad now operated under separate and different franchise ordinances, may be operated by said company as one complete and entire system, thereby better accommodating the public and facilitating the running of the cars of said company; and

17 Whereas, It is desired that the franchise rights of said The Columbus Railway Company to maintain and operate its tracks and lines of street railroad upon each and all of said several streets and avenues shall be made to expire at one and the same date; and

Whereas, It is desired that the burden to be borne by said The Columbus Railway Company in the way of payment of cost of street cleaning, sprinkling, paving and repairs upon the several streets and avenues occupied by its lines, shall be uniform; and

Whereas, The provisions of the existing ordinances under which the said The Columbus Railway Company claims the right to maintain and operate its lines of street railway upon the several streets and avenues, prescribe different and varying rates of fare, and it is desired that there shall be uniformity in, and a reduction of, the rates of fare, and a general system of transfers, applicable to each and every part of the system of street railroads owned and operated by said The Columbus Railway Company; and,

Whereas, A renewal of the grants, rights, privileges and franchises of said The Columbus Railway Company, on the streets and avenues herein and hereinafter named, for said term of twenty five years, upon the conditions hereinafter prescribed in this ordinance, will be conducive to the public interests; now therefore,

Be it ordained by the City Council of the City of Columbus, Ohio, as follows, to-wit:

Routes.

18 Section 1. That the franchises, rights and privileges of The Columbus Railway Company to maintain and operate its tracks and lines of street railroad, with all necessary switches, connections, turn-outs and other appliances suitable and proper for its use, together with the franchise, right and privilege to operate street railroad cars thereon, on the following streets and avenues, and parts of streets and avenues, in the City of Columbus, Ohio, viz:

On High street from the south corporation line of the City of Columbus to its north corporation line, including the loop at Olentangy park; on Chittenden avenue in an easterly direction, from High street to The Cleveland, Cincinnati, Chicago and St. Louis Railway Company's tracks, and alongside said tracks in a southerly direction, forming what is known as the Fair Ground loop; on Goodale street in an easterly direction, from High street to Fourth street; on Chestnut street in an easterly direction from High street to Fourth street; thence on Fourth street in a northerly direction to Naghten street; thence on Naghten street in an easterly direction to Neil street; thence on Neil street in a northerly direction to Mt. Vernon avenue; thence on Mt. Vernon avenue in an easterly direction to Cleveland avenue; thence on Cleveland avenue in a northerly direction to Buckingham street; thence on Buckingham street in an easterly direction to Jefferson avenue; thence on Jefferson avenue in a northerly direction to Leonard avenue; thence on Leonard avenue in an easterly and northeasterly direction to the north corporation line of the City of Columbus; on Mt. Vernon avenue in an easterly direction from Washington avenue to Taylor avenue; thence on Taylor avenue in a northerly direction to Atcheson street;
19 thence on Atcheson street in an easterly direction for a distance of two hundred (200) feet; on Livingston avenue in an easterly direction, from High street to Kelton avenue, including the loop into the Driving park as now built; on Schiller street in an easterly direction, from High street to Parsons avenue; on West Goodale street in a westerly direction, from High street to Neil ave-

nue; thence on Neil avenue in a northerly direction to Eleventh avenue; on Fourth street, from Livingston avenue, in a northerly direction to Wyandotte avenue; on Kelton avenue, from Main street, in a southerly direction to Livingston avenue; on Rose avenue, from Main street, in a northerly direction to Fair avenue; on Sandusky street, in a southerly direction from Broad street to Sullivant avenue; thence on Sullivant avenue, in a westerly direction, from Sandusky street to Glenwood avenue; on West Broad street, from a point opposite the center of the east driveway of the Central Hospital for the Insane (the same being the corporation line of the City of Columbus as established by an ordinance of the City of Columbus, passed on or about May 18th, 1890) to Hague avenue; on Main street in an easterly direction, from Rose avenue to Alum creek; on Oak street in an easterly direction, from Sherman avenue (formerly called Bruce street) to Fairwood avenue; on Cleveland avenue, from Buckingham street northerly to the north corporation — of said City of Columbus; on Neil street from Naghten street in a southerly direction to Spring street; thence on Spring street in a westerly direction to Front street; thence on Front street in a northerly direction to and over the Front street bridge across the railroad tracks; thence along Park street to Spruce street; thence westerly on Spruce street from Park street to Dennison avenue; thence on Dennison avenue southerly to Montgomery street; thence westerly on Montgomery street to Harrison avenue; thence on Harrison avenue, northerly, from Montgomery street to First avenue; thence on First avenue westerly, from Harrison avenue to Pennsylvania avenue; thence on Pennsylvania avenue in a northerly direction from First avenue to Fifth avenue; on Front street in a southerly direction, from Spring street to Fulton street; thence on Fulton street in an easterly direction to Parsons avenue; thence on Parsons avenue in a southerly direction to the south corporation line; on Town street from High street in a westerly direction to Front street; be and the same are hereby renewed to said The Columbus Railway Company, its successors and assigns, for and during the term of twenty-five years, from and after the passage of this ordinance; and the said The Columbus Railway Company is, and its successors and assigns are, hereby granted the franchise and right, and are hereby authorized and empowered to maintain and operate its lines of street railroad upon and over each and all of said streets and avenues, and parts of streets and avenues, aforesaid, for said period of twenty-five years, from and after the passage of this ordinance, upon and subject to each and every of the terms, conditions, stipulations and requirements hereinafter prescribed, and subject to the requirements of the general ordinances of the City of Columbus, Ohio.

To Connect Tracks.

Sec. 2. The said The Columbus Railway Company shall connect its tracks on High street with the tracks of what was formerly known as The Columbus Central Railway, at the intersection of High street

and Spring street, at the intersection of High street and Town
21 street, and at the intersection of High street and Fulton street, so that said lines may be operated as one system, in order to better accommodate the public; and said company, shall have the right to connect, by suitable curves, tracks and appliances, its tracks at any points where they now intersect, or may hereafter intersect, at any time while this ordinance remains in force, under the direction and supervision, and according to plans and specifications to be approved by the Board of Public Works; and may maintain feed wire lines on any streets or avenues where they are now located, and elsewhere when needed, under like direction and supervision, and under plans to be approved by said board.

Provided, further, that said railroad company, in operating its lines of cars, shall make no change in the routes as now operated by it unless such change shall be first approved by resolution of the City Council of said city.

Street Repairs and Improvements.

Sec. 3. The said The Columbus Railway Company, shall keep in repair all that portion of said streets and avenues included within lines drawn one foot on the outside of the outer rails of its tracks; and shall pay for the cleaning, sweeping and sprinkling of said portion of the public way occupied by it and one foot on the outside of its outer rails, at the same rate and in the same manner required of abutting property owners for the residue of the public ways adjacent to said strip. If the City Council at any time orders the improvement of the roadway of any of said streets and avenues, by laying down thereon a pavement of any kind, said company shall, at its own expense, improve that portion occupied by its tracks and one foot on the outside thereof, with the same character of materials; or, if
22 on the said streets or avenues a pavement has already been laid, and an assessment therefor placed on the tax duplicate, said company shall pay to the Director of Accounts of the City of Columbus, Ohio, such portion of the assessment for said improvement as the space occupied by said tracks and one foot on the outside of the outer rails bears to the entire width of the improved roadway; such sum to be by the Director of Accounts paid to the City Treasurer, and by him to be credited to any portion of the assessment made for the cost of such improvement, remaining due from, and unpaid by, the several abutting property owners; provided, that if in any case the amount so paid shall exceed the unpaid assessments, the excess shall be by the Director of Accounts paid to the abutting property owner entitled thereto.

Pavements.

Sec. 4. The pavements provided for in this ordinance shall be laid at such height or grade as may be fixed or determined by the Board of Public Works, and shall, during the existence of this ordinance or grant, or any extension, amendment or renewal thereof, be kept in

repair under the direction and supervision of such officers as may be from time to time vested by law or ordinance of the City Council with the control and supervision of the Public Highways and Works of said city; and on the failure of the company to make said repairs within thirty (30) days after receiving notice so to do from the City Council, the City Council may make the same or cause the same to be done, and said City of Columbus shall collect all the cost and expense thereof from said company, and the entire amount of such
23 cost and expense shall constitute a lien and charge upon the property and franchise of said company the same as if formally levied and assessed as in the case of other municipal improvements. Whenever the said railroad is *bring* put down on any unimproved street or streets, said company shall grade the street or streets from curb to curb at its own expense on a level with its tracks.

Damage Indemnity.

Sec. 5. Said Railway Company shall, at all times hereafter, defend, indemnify and keep harmless the City of Columbus from any and all damages, lawful claims and demands for injuries to persons or property, the cost and expense of which said city may be subjected to or made liable for, by any proceedings at law or in equity, or otherwise, growing out of the grant of the privileges in this ordinance granted or out of the exercise or enjoyment of the same by said company, or out of the failure of said company to construct and keep in repair the pavement or other improvement by it herein required, or authorized, to be constructed and maintained; and said company may, at its own cost defend against such actions, either in its own name or in the name of the City of Columbus.

Temporary Track Removals by City.

Sec. 6. The said City of Columbus shall have the right to temporarily remove or obstruct, or authorize the same to be done, any portion of the railroad tracks of said company, whenever and wherever it shall be necessary in laying down or repairing water pipes,
24 gas pipes, sewers, drains, gutters or cisterns, or to use hose or any other apparatus necessary to be used in extinguishing fires, or any other public work or improvement required to be done by said city, not disturbing the running of cars where it can be avoided, without incurring any liability for damage to said company.

Speed and Control of Cars.

Sec. 7. Said company shall at all times conform to such reasonable rules and regulations as are, or may hereafter be prescribed by ordinance, as to the rate of speed it may run its cars; and when its cars are about to start, and when in motion, if reasonable cause therefor exist, warning shall be given by gong or otherwise, to notify persons of immediate or approaching danger? No car shall be started or put in motion while any passenger is in the act of entering the same or

alighting therefrom. Cars running in the same direction shall not approach nearer to each other than one hundred feet, unless from unavoidable necessity or on switches or turnouts. Gongs shall be sounded as a warning on all cars approaching each other from opposite directions, and on each car approaching street intersections, which the car is to pass from one street to another, where there are buildings to prevent persons on foot or persons in other vehicles on the street from seeing the approaching car; the warning last aforesaid to be given at a distance of not less then fifty feet from such street corner and from time to time until the car reaches such intersection.

25 Sewer and Water Pipes.

Sec. 8. The said City of Columbus shall not be liable in any way to said company for damages it may sustain from the breaking, or overflow of waters from, any sewer or drain, or from the breaking of any water pipe or gas pipe by reason of any change in the grade of said streets; and said company shall so construct its tracks as to fully protect from damage thereby any and all sewers, water pipes and mains, gas or other pipes running beneath the surface of the streets.

Snow and Ice.

Sec. 9. In case it becomes necessary for said company to remove snow and ice from its tracks on said streets, it shall not be left in such manner as to interfere with or impede travel or render the street dangerous.

Conductors and Motormen—Exercise of Caution.

Sec. 10. The conductors in charge of cars shall not allow any lady or child to enter or leave any car while in motion; and the conductors and motormen shall keep a vigilant watch for all teams, carriages, persons and obstructions upon or near the track, and upon first appearance of danger, shall give warning and stop the car if necessary, to prevent accident; and the motormen must always be on the front platform while the car is in motion.

Motive Power and Safe Equipment.

Sec. 11. Permission is hereby given said company to operate
26 its entire lines of street railroad with any and all extensions that may hereafter be made thereto, by electricity, or such other motive power, other than animal or steam power, as shall be acceptable to the city. Said company shall have the right to erect and maintain iron or wood poles, painted and neat in appearance, wires, fixtures and conduits, and any and all other appliances, or appurtenances that in the opinion of the city shall be found necessary. At and after dark all cars running shall be lighted and provided with suitable signal lights. All cars shall be kept clean, and when the

tempera ure is below 35 degrees Fahrenheit, shall be heated. No car shall be allowed to remain standing upon the line of any route for passengers or any other purpose so as to impede any other vehicle, but shall be subject to such police regulations as are or may be prescribed for any other vehicles so far as they may be applicable. No car or cars shall be used on such railroad if worn out, broken, or so constructed, or kept in such a condition as to imperil the lives, limbs or health of the passengers; provided, that if any time during the life of this grant or any extension thereof, said city shall require, by ordinance, all trolley wires or other electric wires in the principal business dis rict of said city to be placed in conduits under ground, said company shall within a reasonable time after the passage of such ordinance, which time shall be fixed by said city, place all its trolley wires, and feed wires within said district, under ground.

Wires and Poles.

Sec. 12. In the erection or placing of wires or conduits and in the use of any and all other appliances and appurtenances found necessary to operate said company's lines of railroad, a plan of the
27 same, showing all poles, wires and other appliances or appurtenances that said company shall, desire to use, shall be submitted to and approved by the Board of Public Works. Said city shall have the right to fix the height of all wires and poles above the street, and the size and location of all poles and conduits in the street, to determine the places in the stree s where any and all tracks, appliances and appurtenances shall be located, and to establish such regulations with reference to the Public Safety and protection as the city shall from time to time deem necessary and proper.

Interurban Lines.

Sec. 13. The said city hereby reserves the full right and power at any time during the life of the grant herein made to grant to any other company, corporation or individual, engaged in operating an interurban railroad to jointly use with said The Columbus Railway Company any track or part -hereof owned or operated by said The Columbus Railway Company, which may be necessary to enable the cars operated on such interurban railroad to pass by the most direct route to and from High street, if said cars shall enter said city west of High street, and to and from High street if said cars shall enter said city east of said High street, and to and from Chestnut street, if said cars shall enter said city north of Chestnut street and to and from Town street, if said cars shall enter said city south of Town street, upon equitable terms of payment therefor to said The Columbus Railway Company, taking into consideration the value, cost of
28 construction and maintenance of the track or tracks and over head construction so jointly used, the amount paid by said The Columbus Railway Company, its predecessors, successors and assigns, whether to said city or to abutting property owners, for street paving and the cost of maintaining the same upon such street

or streets so occupied, the pro rata amount of taxes and assessments paid on such track or part thereof, and the cost of power used in operating such interurban cars. If such right to joint use be granted by said city and if terms of compensation therefor cannot be agreed upon by said The Columbus Railway Company and the corporation, company or individual applying for such joint use, within sixty days after such grant is made by said city, the terms of compensation therefor shall be submitted to arbitration, one arbitrator to be chosen by said The Columbus Railway Company, one by the corporation, company or individual applying for such joint use, these two to select a third arbitrator. The decision of said arbitrators, in the absence of fraud, accident or mistake of law or fact, shall be conclusive on both parties. But neither such arbitration nor any appeal therefrom shall in any way delay such joint use and occupation, when so granted as aforesaid, provided such grantee of the right to such joint use shall first secure to the satisfaction and acceptance of said The Columbus Railway Company the payment of the compensation which may be awarded by said arbitrators. No interurban cars shall be operated over any track or tracks, or parts thereof of said The Columbus Railway Company under and by virtue of the foregoing provision of this ordinance authorizing said city to compel such joint use, more frequently than one car each way every thirty minutes. Said The Columbus Railway Company is hereby authorized and em-
29 powered to make and carry out contracts or traffic arrangements, for the use of any of its tracks or any part thereof, by interurban cars of a g*u*age different from that of its own cars, and, with the consent of said city to permit the laying and the use of a third rail for said purpose; but it shall not permit such joint use or the laying of such third rail except over such route as may be necessary to enable such interurban cars to reach, and return from, the tracks now known as the interurban loop as now existing or hereafter modified. It is intended and understood that the phrases "interurban cars" and "cars operated on such interurban railroads" refer to and mean only such cars as shall be operated at regular intervals between said City of Columbus and some other city, or some village, at least ten miles distant from the limits of said City of Columbus, where such interurban cars enter the same. Any grant or traffic arrangement made by said The Columbus Railway Company to any other corporation, company or individual, to use any of its tracks or any part thereof, shall be subject to all rules and regulations of said city now in force, and all reasonable rules and regulations which may hereafter be adopted by said city, concerning the rate of speed and headway, and the operation, character, lighting and heating of all cars so operated under such grant or traffic arrangement for such joint use, and for the comfort and safety of passengers carried thereon.

Interurban Passenger and Freight Cars.

Sec. 14. Neither said The Columbus Railway Company nor any other person, company or corporation which may hereafter ob-

tain the right to use any of its track or tracks, shall move
30 along or over the same any passenger cars in trains of more than three cars per train, including the motor car.

Freight cars shall not be moved along or over the whole or any part of the tracks of the said The Columbus Railway Company in said city, except upon the streets and avenues or parts of streets and avenues hereafter designated by ordinances which may hereafter be passed by the City Council of said city granting such permission; provided, however, that said company may transport over any of its lines, material to be used by it in construction of repairs and extensions.

Conductors and Mortormen—Duties.

Sec. 15. At all times when any car is in use a motorman in charge of such car shall be stationed on the front platform of the motor car; and there shall be a conductor on each car, whose duty it shall be to collect fares and to look out for the safety and comfort of passengers.

Electrolysis.

Sec. 16. In the construction of its trolley wires, said company shall safeguard the water pipes, and any other system of iron pipes which may be maintained by said city, by using what is known as the "double trolley system," or such other device, to be approved by the Board of Public Works, as shall effectually protect such pipes from injury by electrolysis.

To Expend a Million Dollars.

Sec. 17. Said company shall, as rapidly as the requirements
31 of its railroad system and the efficient service of the public demands, during the life of this grant, expended not less than $1,000,000.00 in extensions and betterments, and shall, at all times during the life of this franchise, furnish, upon all its lines, efficient and adequate service and a sufficient number of first class, commodious cars for the accommodation of its patrons. The City Council of said city may, by ordinance, require such reasonable extensions of such of the lines operated by said company as may be necessary for the efficient operation of such railroad and for the convenience of the public, whenever along the line of any such proposed extension and between parallel lines four hundred feet distant on each side thereof, there shall be when such extension is ordered, not less than one hundred and fifty separate buildings, used and occupied as dwellings, per mile or in like proportion for any less distance; but said company shall not be required to construct more than one mile of extensions within one calendar year.

It is expressly provided that any and all franchise rights to operate extensions which may hereafter be granted to said company, shall expire at the expiration of said period of twenty-five years.

Grooved Rails and Kind of Pavement.

Sec. 18. In making extensions on paved streets, and in relaying tracks on paved streets, grooved or other modern and improved rails of weight and pattern to be approved by the Board of Public Works of said city shall be laid; such rails shall be laid upon foundations of concrete or other material, and according to plans to be approved by said board.

32 Whenever any unpaved street, or any part of any street, along which said company operates lines of street railroad, shall hereafter be improved by laying down thereon a pavement, said company shall relay its tracks thereon in the manner aforesaid, and shall pave the portion of such street as provided in sections 4 and 5 of this ordinance.

Cash Deposits for City Repairs.

Sec. 19. Said company shall keep on deposit with the said city at all times the sum of one thousand dollars as an emergency fund, against which the city may draw, upon vouchers drawn by the Director of Accounts, with the approval of the Board of Public Works, for the cost and expense of any repairs made by said city, which, by the terms of this ordinance, should have been made by said company, and which said company after due notice and reasonable opportunity has failed or neglected to make within the time prescribed by this ordinance; and said company shall at once replace any portion of said fund, expended as aforesaid so as to keep on deposit at all times the amount of one thousand dollars; and at the expiration of the time granted by this ordinance any sum remaining in said fund due to said company shall be refunded.

Perpetual Franchises.

Sec. 20. The grants and provisions hereinbefore made and contained for the renewal of the franchise of the said The Columbus Railway Company on the streets and avenues hereinbefore mentioned in section 1 of this ordinance, shal in all respects apply to the grants, rights, privileges and franchises of the predecessors in

33 title of said The Columbus Railway Company, to construct, maintain and operate lines of street railway on Main Street, (formerly called Friend Street) from High street to Rose avenue; on State street from High street to Grant avenue; thence in a northerly direction on Grant avenue to Oak street; thence on Oak street in an easterly direction to Sherman avenue, (formerly called Bruce street); on Long street from High street in an easterly direction to Mulberry street, and thence in a southerly direction on Mulberry street from Long street to Broad street; on Cleveland avenue in a northerly direction from Long street to Mt. Vernon avenue; thence in an easterly direction on Mt. Vernon avenue to Washington avenue; on West Broad street from High street to a point opposite the center of the east driveway to the Central Hospital for

the Insane, (the same being the corporation line of the City of Columbus as established by ordinance of the City of Columbus, passed on or about May 18th, 1890); on Glenwood avenue in a southerly direction from Broad street to the Harrisburg pike; thence in a southwesterly direction on the Harrisburg pike to Green Lawn cemetery; as fully as if the routes and streets and avenues mentioned in this section were specifically mentioned and included in the first section of this ordinance, if, and so far as, the franchises in the streets and avenues mentioned, in this section or either of them or any part thereof shall hereafter be judicially declared by a court of competent jurisdiction, or by any appellate court to which any suit brought to test any or all of said franchises shall be brought, may be carried by proceedings in error or on appeal, not to be franchises in perpetuity.

It is expressly provided that nothing contained in said
34 ordinance is intended, nor shall anything herein be construed to be, a concession by said City of Columbus of the validity of any claim of said company to perpetual franchises to operate lines of street railroad in all or any of the streets and parts of streets named in this section.

It is further expressly provided, that nothing contained in this ordinance shall be pleaded or considered to be a bar to any suit or suits which may hereafter be brought in any court or courts of competent jurisdiction, seeking to test the validity of any claim or claims to said company to perpetual franchises to operate any line or lines of street railroad upon any of the streets or parts of streets mentioned in this section.

Fares and Transfers.

Sec. 21. Said The Columbus Railway Company, its successors and assigns, shall be entitled to charge fares within the corporate limits of said city during the term herein provided at the following rates, and no more, to-wit: For a single cash fare, 5 cents; for tickets in packages of seven twenty-five cents, until the annual gross receipts from all fares received on all lines operated by said company within said city amount in the aggregate to the sum of one million seven hundred and fifty thousand dollars ($1,750,000.00) and after said annual receipts amount to said sum, for tickets in packages of eight, twenty-five cents, all of which tickets shall be good for use from the time the regular cars start in the morning until the regular cars quit running at or shortly after midnight; for single fares between the hours when regular cars quit running at or shortly after
35 midnight until such cars commence running in the morning, during the first five years of the term granted by this ordinance, ten (10) cents, and thereafter five (5) cents.

No charge shall be made for children under six years of age attended by parent or other person. Children over six years of age and under ten years of age shall be carried for 3 cents each.

Tickets for the rates required by this ordinance shall be kept on sale and sold at the principal office of said company in the City of Columbus during business hours and at all times by conductors on

the regular cars of said company at the rates for tickets aforesaid. For each cash fare and for each ticket said company shall, on demand of the passenger tendering the same, issue to such passenger a transfer slip good for one continuous passage in said city on any other line of street railroad owned or operated by said company which connects with, diverges from, or crosses, the line on which said transfer was issued, if presented within fifteen minutes after the time designated by punch marks on transfer slip, which time so designated shall be a reasonable arriving time of car at any one of the transfer points of the line by which such transfer was issued.

For each five cent cash fare said company shall, on demand of the passenger tendering the same, issue to such passenger a transfer slip good for one continuous passage over any other line of electric railway now constructed or hereafter constructed or operated in said city by any person, company or corporation, other than The Columbus Railway Company, whose charge for transfer slips is not less than that of said The Columbus Railway Company, and
36 whose line of railroad connects with, diverges from, or crosses any line of road of said The Columbus Railway Company; provided, that the company, corporation or person operating such other line as aforesaid shall be required by said city to accept said transfer slips for such passage, and to exchange transfers with said The Columbus Railway Company; and said The Columbus Railway Company shall be required to accept, from all passangers, transferred from such lines of other roads, similar transfer slips good for continuous passage over its lines in said city, if presented in the time above provided; and the receipts from the passengers purchasing such transfer slips, so issued as aforesaid by said The Columbus Railway Company, and by any other person, company or corporation, operating lines which cross the same or connect therewith, shall be equally divided between the operators of said lines of railroad respectively.

No free transportation shall be furnished except to officers and employes of the said railroad company, and, when permitted by law, to policemen and firemen of said city wearing their official uniform.

All Night Cars.

Sec. 22. Between the hours of 5:30 a. m. and 12 o'clock midnight cars shall be run at intervals not to exceed the following, viz: High street, between north and south corporation lines, 10 minutes; Schiller street and High street, to north corporation line, 10 minutes; Long street, 6 minutes; Main and Neil avenue, 6 minutes; State and Oak streets, 7 minutes; Livingston avenue and Fourth street, 10 minutes; Leonard avenue and Camp Chase, 11 minutes; Mr. Vernon avenue and cemetery, 11 minutes; Central mar-
37 ket line, 15 minutes; Pennsylvania and Parsons avenue, 19 minutes. Between the hours of 12 o'clock midnight and 5:30 o'clock a. m., cars shall be run, starting at 1 o'clock, a. m. and continuing until 5 o'clock a. m., hourly upon High street, West Broad street, and on two lines to be hereafter designated by said city, running easterly from High street.

Expiration.

Sec. 23. Upon the expiration of the term of the renewal franchise herein granted said company shall, unless a further renewal be granted by said city, remove all its tracks, wires and other appliances from the streets and avenues of said city and leave the portion of each and every street occupied by its lines in good condition, corresponding in finish and material with the remainder of such streets and avenues.

Sec. 24. The terms "the city" and "said city" whenever used in this ordinance, unless the context clearly indicates a different intention, are intended and shall be construed to mean The City of Columbus, Ohio; and the terms "the company" and "said company" and "The Columbus Railway Company" whenever used in this ordinance, unless the context clearly indicates a different intention, are intended and shall be construed to mean The Columbus Railway Company, its successors and assigns.

Sec. 25. If at any time in the future the laws of Ohio shall be so amended as to do away with the Board of Public Works as now constituted by law, then and in that event the powers and duties herein conferred upon and required of the Board of Public Works shall be performed by such city officer or board as shall, by law, be entrusted with the duties and powers now performed by such board. 38–39 If in the future the laws shall be so amended as to do away with the Director of Accounts of said city as now constituted by law, then the powers and duties conferred upon the Director of Accounts under this ordinance shall be exercised by such officer of the city as shall by law succeed to his powers and duties.

Repeal and When in Effect.

Sec. 26. The provisions of any and all ordinances and resolutions, and parts of ordinances and resolutions, heretofore passed or adopted by the City Council of said city, which is inconsistent with the terms of this ordinance, are hereby repealed and rescinded.

Sec. 27. This ordinance shall take effect and be in force from and after its passage and legal publication, and the filing by said The Columbus Railway Company, with the City Clerk of said city, of its acceptance in writing of each and all of the terms, provisions and requirements of this ordinance; provided, however, that if said company shall fail to file such written acceptance within thirty days after the passage of this ordinance, then this ordinance shall be void and of no force and effect, but if said company shall be prevented from accepting the terms, provisions and requirements of this ordinance by injunction or other judicial or legal process, or if its acceptance thereof shall be delayed or postponed in the manner or by the means aforesaid, said Company may accept the terms, provisions and requirements of said ordinance at any time within thirty days after the expiration of the period during which said acceptance shall

have been prevented or delayed as aforesaid, in which event
40 said acceptance shall have the same effect as if the same had been filed within thirty days after the passage of this ordinance.

Passed. February 4, 1901.

JAMES J. THOMAS,
President of the City Council.

Approved by the Mayor, February 6, 1901.
Attest:
JOHN T. BARR,
City Clerk.

41 EXHIBIT No. 2.

An Ordinance, No. 17802,

Granting permission to The Central Market Street Railway Company, its successors and assigns, to construct, operate and maintain a single or double track street railway, with necessary sidetracks, curves, turn-outs and switches in the following streets of the City of Columbus, Ohio, towit: Rich Street, Fifth Street, Donaldson Street, Livingston Avenue, Mohawk Street, Reinhard Avenue, Jaeger Street, Hanford Street, Fourth Street, Hosack Street, Innis Avenue and Parsons Avenue to the south corporation line of said City of Columbus.

(City Record Book 11, Page 516.)

Whereas, Application has been made in writing to the Board of Public Works, and the City Council of the City of Columbus, Ohio, for a franchise to construct, operate and maintain a street railway upon Rich street, Fifth street, Donaldson street, Livingston avenue, Mohawk street, Reinhard avenue, Jaeger street, Hanford street, Fourth street, Hosack street, Innis Avenue and Parsons avenue, to the south corporation line of the said city; and

Whereas, Notice of said application has been published according to law; and

Whereas, Bids have been advertised for and received by said city for the construction of a railroad upon said streets as required by law; and

Whereas, The Central Market Street Railway Company bid and agreed to carry passengers upon said proposed railroad along said route at a lower rate of fare than any other bidder; and

Whereas, The consent in writing of the owners of the majority of the feet front of the lots and lands fronting and abutting upon said parts of said streets has been obtained and filed with the Clerk of said city for the construction, operation and maintenance
42 of said street railroad. Now therefore,

Be it ordained by the City Council of the City of Columbus, Ohio, as follows, towit:

Section 1. That The Central Market Street Railway Company, its successors and assigns, be and is hereby granted permission and authorized to construct, operate and maintain a street railway in and upon the following streets in the city of Columbus, Ohio, towit: In Rich street from Third street to Fifth street; in Fifth Street from Rich street to Donaldson street; in and across Donaldson street and Livingston avenue to Mohawk street, in Mohawk street from Donaldson street and Livingston avenue to Reinhard avenue; in Reinhard avenue from Mohawk street to Jaeger street; in Jaeger street from Reinhard avenue to Hanford street; in Hanford street from Jaeger street to Fourth street; from Hanford street to the south corporation line of said city; in Hosack street from Fourth street to Parsons avenue; in Innis avenue from Fourth street to Parsons avenue; in Parsons avenue from Innis avenue to the south corporation line of said city in accordance with the provisions of this ordinance; with permission to connect the track or tracks on said streets with each other, and with the track or tracks of The Columbus, London and Springfield Railway Company, and The Columbus, Buckeye Lake and Newark Traction Company at Rich and Third streets, by means of a curve or curves.

Sec. 2. Said grantee and assigns shall have the right to lay down a single or double track on the route described in section 1 of this ordinance, with switches and turn-outs, wherever switches and turn-outs may be necessary or convenient, and to connect said track or tracks by curve or curves with its other track or tracks, and with the tracks of the other intersecting standard gauge street railroads within the city limits of Columbus, Ohio.

43 A plan showing the location of such switches, tracks and turn-outs shall be submitted to the Board of Public Works of said city and approved by it, before the construction thereof.

Sec. 3. That said track shall be of a standard gauge of four feet and eight and one half inches in width, and on paved streets the rails shall be standard patterns, grooved rails, not less than 70 pounds to the yard, to be approved by the Board of Public Works, and upon such foundation as said Board shall direct. The space between the inner rails where the double tracks are laid shall not exceed five feet, measured from rail to rail.

Sec. 4. Said grantee, its successors and assigns, shall keep in repair all that portion of said streets and avenues which is included within lines drawn one (1) foot outside of the outer rails of its said tracks; and shall pay for the cleaning, sweeping and sprinkling of said portion of the public way occupied by it, and one foot on the outside of its outer rails, at the rate and in the same manner required of the abutting property owners for the residue of the public ways adjacent to the said strip. If the City Council at any time orders the improvement of the roadway of any of said streets, avenues or alleys by laying down thereon a pavement of any kind, or a macadam roadway, said company shall, at its own expense, improve that portion occupied by the tracks of said road and one foot outside thereof with the same character of material as is used on the remainder of the street, and shall relay its or their tracks on any street or streets so paved with

grooved rails on foundations as specified in section 3 hereof; or if on any of the said streets or avenues a pavement has already been laid, and an assessment therefor placed on the tax duplicate, said company shall pay to the Director of Accounts of the city of Columbus, Ohio, a proportion of the present value of the pavement covered by the assessment for said improvement as the space occupied by said tracks and one foot on the outside of the outer rails thereof bears to the entire width of the improved roadway. Such sum to be by the Director of Accounts paid to the City Treasurer, and by him to be credited to any portion of the assessment made for the cost of such improvement, remaining due from, and unpaid by, the several abutting property owners. Provided, that if in any case the amount so paid shall exceed the unpaid assessments, the excess shall be by the Director of Accounts paid to the abutting property owner entitled thereto. The present value of the street paving referred to in this section to be determined by the Board of Public Works in consultation with the officers of said railway company, and in case a satisfactory price cannot be agreed upon the matter is to be settled by arbitration according to the provisions of the Revised Statutes of Ohio.

Sec. 5. The pavement provided for in this ordinance shall be laid at such height of grade as may be fixed or determined by the Board of Public Works, and shall, during the existence of this ordinance, or grant, or any extension, amendment, or renewal thereof, be kept in repair under the direction, or under the supervision and direction of such officers as may be from time to time vested by law, or ordinance of the City Council, with the control and supervision of the public highways and works of the city, and on the failure of the company to make said repairs within thirty (30) days after receiving notice so to do from the Board of Public Works, the said board may make the same, or cause the same to be done, and the said City of Columbus shall collect all the cost and expense thereof from said company and the entire amount of such cost and expense shall constitute a lien and charge upon the property and franchise of said company, the same as if formally levied and assessed as in the case of other municipal improvements. That whenever the said railway is being put down on any improved street or streets said grantee and assigns shall grade the street from curb to curb at its own expense, and on a level with its tracks.

Sec. 6. Said grantee and its assigns shall at all times hereafter defend, keep harmless and indemnify the city of Columbus from any and all damages, lawful claims, and demands for injuries to persons or property, cost and expenses to which said city may be subjected or made liable by any proceeding at law or in equity growing out of the grant of the privileges in this ordinance granted, or out of the exercise or enjoyment of the same by said grantee and its assigns, or out of the failure of said grantee and assigns, to construct or keep in repair the pavement or other improvements by them herein required to be constructed and maintained; and said grantee or its assigns may, at its own cost, defend against such action, either in its own name or in the name of the City of Columbus.

Sec. 7. The said city of Columbus shall have the right to remove

or obstruct, or authorize the same to be done, any portion of said railroad track wherever it shall be necessary in laying down or repairing water pipes, gas pipes, sewers, drains, gutters or cisterns or by hose or any other apparatus necessary to be used in extinguishing fire, or any other public work or improvement required to be done by said city, not disturbing the running of cars where it can be avoided, without incurring any liability for damage to said grantee.

Sec. 8. The said city of Columbus shall not be liable in any way to said grantee or its assigns, for damages it may sustain from the breaking or overflow of water from any sewer or drain, or from the breaking of any water pipe or gas pipe, or by reason of any change in the grade of said streets, and said grantee and assigns shall so construct the track as to fully protect from damage thereby any and all sewers, water pipes and mains, gas or other pipes running
46 beneath the surface of the streets. Whenever the surface drainage of any street (whether improved or unimproved) be obstructed by the laying of said track the said grantee or its assigns shall construct all catch basins and pipe lead-offs, or relay so much of the paved roadway of said street at its or their expense, as in the opinion of the said Board of Public Works may be necessary to overcome the effects of such obstruction.

Sec. 9. In case it becomes necessary for said grantee and its assigns to remove the snow and ice from the tracks on said streets, it shall not be left in such a manner as to interfere with or impede travel or render the streets dangerous.

Sec. 10. The conductors, drivers or motormen of cars shall not allow any woman or child to enter or leave any car while in motion, and shall keep vigilant watch for all teams, carriages, persons and obstructions upon or near the track, and upon the first appearance of danger thereto, shall give warning and stop the car, if necessary, to prevent accident, and either the driver, conductor or motorman must always be on the front platform while the car is in motion.

Sec. 11. No car shall be run at a greater rate of speed than twelve miles an hour. Cars driven in the same direction shall not approach nearer to each other than one hundred feet, unless from unavoidable necessity, or on switches or turn-outs. Said grantee and assigns shall at all times conform to such general rules and regulations as may from time to time be made by the council as to the rate of speed it may run its cars, and while the cars of said grantee and assigns are in motion or about to start, warning shall be given by bell or otherwise, to notify persons of any immediate or approaching danger.

Sec. 12. Permission is hereby given said grantee and its assigns to operate its entire line of street railway with any and all exten-
47 sions that may hereafter be made thereto, by electricity or other motive power, other than animal or steam power, as shall be acceptable to the city for such purposes. Said grantee and its assigns shall have the right to erect and maintain iron or wood poles, painted and neat in appearance, wires, fixtures and conduits, and any and all other appliances or appurtenances that in the opinion of said city shall be found necessary. At and after dark, all cars running shall be lighted and provided with suitable signal lights, and

cars shall be kept clean, and when the temperature is below 35 degress Fahrenheit, shall be heated. No car shall be allowed to remain standing upon the line of said route for passengers or any other purpose, so as to impede any other vehicle, but shall be subject to such police regula ions as are, or may be, prescribed for other vehicles, so far as they may be applicable. No car or cars shall be used on such railroad if so worn, broken or constructed, or kept in such condition as to imperil the lives, limbs or health of the passengers; provided, that if at any time during the life of this grant or any extension thereof said city shall require by ordinance all trolley wires or other electric wires in the principal business district of said city to be placed in conduits under ground, said grantee and its assigns shall within a reasonable time after the passage of such ordinance, and which time shall be fixed by said city, place all its trolley and feed wires within said district under ground. In the construction of its system of trolley wires said company and its assigns shall guard against injury to the water and other pipes of said city from electrolysis by the use of what is known as the "double trolley system" or such other device as may be approved by the Board of Public Works for that purpose.

Sec. 13. In the erection and placing of wires or conduits and in the use of any and all other appliances or appurtenances found
48 necessary to operate its line, a plan of the same, showing all poles, wires and other appliances or appurtenances that said grantee and its assigns shall desire to use, shall be submitted to and approved by the Board of Public Works. Said city shall have the right to fix the height of all wires and poles above the street, the size and location of all conduits in the street, and the distance at which poles shall be apart, and to regulate the places within the street where any and all tracks, appliances and appurtenances shall be located and to establish such regulations with reference to public safety and protection as the said city shall from time to time deem necessary and proper.

Sec. 14. Cars shall be run by said grantee, and its assigns, at no longer intervals than fifteen minutes, unless prevented by unavoidable casualty, and shall be operated regularly between 8 a. m. and 10 P. M. on Sundays, and between 5:30 a. m. and 11:30 p. m. on all other days; and said grantee and its assigns shall not run a train of more than three cars, including the motor, on any of its lines in said city.

Sec. 15. The Central Market Street Railway Company, and its assigns, shall be entitled to charge fares as follows, and no more: For single fare within the corporate limits of said city, five cents; for seven tickets, twenty-five cents. No charge to be made for children under six years of age, attended by parents or other person in charge of them. Children over six and under twelve years of age shall pay three cent fares. For each five cent fare said company and its assigns, shall on demand, at the time of payment of said fare, issue a transfer slip good for continuous passage within said city, over any line of railway connecting with or intersecting its line of railway, now or hereafter built, if presented within twenty minutes after leav-

ing the car of the issuing company, providing said transferee line be required by said city to accept such transfer slip for such
49 passage. And the said The Central Market Street Railway Company, and its assigns, shall be required to accept from any such connecting or intersecting line, similar transfer slips, which shall be good for immediate continuous passage over its line within said city of Columbus. The fares paid, for which such transfers are issued, shall be divided equally between the operators of the two connecting or intersecting lines of railways over which said fares are paid.

Sec. 16. Said grantee and its assigns, shall have the right to carry passengers, United States mail, packages, express matter, baggage and freight, on its said lines in said city of Columbus, but shall not have the right to move along its lines within the business district of said city any steam railroad freight or passenger cars, and all cars of said company and its assigns carrying packages, express matter, baggage and freight, shall be loaded and unloaded in a depot or a place to be hereafter designated by said company and its assigns on lands abutting on its said line, and shall have the right and permission to put in proper curves, switches and tracks on said streets and avenues from its said lines to its said depot across the sidewalk in front thereof to said depot at any point along its said line in said city of Columbus. Said company or its assigns may selec for its use in loading, unloading and storing all kinds of freight and its cars, except live stock, and shall have the like right and permission to put in proper curves, switches and tracks on said streets and avenues from its said lines to said depot across the sidewalk in front thereof, at any point along its said lines in the said city of Columbus.

Sec. 17. Said The Central Market Street Railway Company or its assigns, shall have the right to connect its lines with the standard gauge loop in the central portion of said city, and shall have the right and permission to use and occupy said loop under the terms and
50 conditions contained in section 15 of ordinance No. 15,676, passed by the council of the city of Columbus, on the 23rd day of April, 1900, except that said company and its assigns shall only be required to run its said passenger cars over said loop, as required by this ordinance over its other lines within said city, and all the lines of said company and its assigns in said city shall be subject to all provisions contained in said section fifteen (15) of said ordinance No. 15,676 aforesaid.

Sec. 18. As a consideration for the grants herein made the said The Central Market Street Railway Company and its assigns shall pay to the city of Columbus the following per cent upon the gross receipts of said company for local passengers fares received within said city of Columbus, towit: two per cent of said fares, during the term of said franchise, provided that by "local fares" is meant only those fares for passengers transported entirely within the limits of said city and does not include any part of fares for passengers carried partly within and partly without said limits. Said payments shall be made annually at the beginning of each calendar year for the amounts earned during the preceding year, accompanied by a

statement of the gross receipts during said period from local fares, duly verified by the proper officer of said company and filed with the Director of Accounts.

The director of Accounts of said city, within 30 days immediately following the time of said payment, shall haave access during business hours, to the books of said grantee or assigns for the sole purpose of ascertaining the amount of local fares received by said grantee or its assigns for carrying said passengers within said city limits during such preceding year. Provided, however, that if at the beginning of any calendar year the said The Central Market Street Railway Company, and its assigns, shall notify said city of Columbus that
51 it will, and shall thereafter sell tickets for one passage upon its road in Columbus, Ohio, at the rate of eight tickets for 25 cts. and 33 tickets for one dollar, then said railway company shall be relieved from the further annual payments to said city under this section so long as it shall continue to sell tickets at such reduced rates.

Sec. 19. This grant is made and shall continue in force for the full period of twenty five (25) years from and after the 23rd day of April, 1900, and all franchises and grants to said grantee and its assigns for extensions of lines, turn-outs, switches, connections or additional lines of street railway connected with, or to be connected with the lines of street railway of said grantee and its assigns, authorized and permitted under this ordinance, shall be considered a part of the system of street railway hereby authorized, and shall expire and wholly terminate with the expiration of the franchise and grant authorized under the terms of this ordinance.

Sec. 20. This grant is made upon the condition that said railroad shall be constructed and ready for operation within said city of Columbus within two years from the passage of this ordinance, and if not constructed and in operation within said time the grant herein and all rights thereunder shall thereupon and without any action on the part of said city, cease and determine. Provided that if said grantee and its assigns be delayed in the construction by injunction or other proceedings in court over which it has no control, the time it is so delayed by such proceedings shall not be counted as a part of the period within which said railway is to be constructed and made ready for operation, but said period for such construction and putting in readiness for operation shall be extended by adding to the period of two years aforesaid the length of time said company is so delayed by said causes.

Sec. 21. Upon the expiration of the term of twenty five
52 (25) years, provided by this ordinance, unless such grant has been renewed or extended by said city, the city of Columbus shall have the right by giving two years' notice in writing, before the expiration of said term of twenty five years, of its intention so to do, to purchase of the said grantee and its assigns so much of its lines of railway as then lies within the city at a purchase price to be fixed by three disinterested men, one of whom shall be selected by the city, one by said grantee or its assigns, and the third by the two so chosen; provided, that if said city shall not elect to purchase

said portion of said railway or shall not renew or extend said grant, then said grantee and its assigns shall within eight months from the expiration of said time remove the tracks, wires, poles and conduits and other properties from the streets so occupied by it, and shall leave the portions of the streets so occupied by them in good condition and repair. And if the said city elects to make said purchase the price fixed therefor shall be paid the said grantee or its assigns in cash before taking possession of said part of said railway, and within sixty days after said price is so fixed by said arbitrators; and in default of such payment within said time said option to cease and determine.

Sec. 22. The said city hereby reserves the full right and power to grant to any other company, corporation or individual, the right to jointly use all or any part or parts of said tracks with said The Central Market Street Railway Company and its assigns, and with each other upon equitable terms of payment to said The Central Market Street Railway Company, and its assigns, taking into consideration the value, cost of construction, amounts paid and repaid for street paving and other street improvements and the maintenance of the tracks so used and of the power used for operation.
53 In the event said terms cannot be agreed upon by said owning, succeeding or assignee company, and the party applying for said joint use within sixty days after application therefor following a grant for such joint use by said city, said terms shall be submitted to arbitration, one arbitrator to be chosen by said owner, successor or assignee, one by the party desiring to jointly use said tracks, and these two so selected to select the third arbitrator. The decision of said arbitrators in the absence of fraud, accident or mistake of law or fact, to be final and conclusive on both parties. But said city of Columbus reserves the right to fix and determine by ordinance the rules and regulations governing such joint use and occupation. Provided, that neither the arbitration herein mentioned nor any appeal therefrom, shall in any manner delay the joint use and occupation by any person, firm or corporation, which shall receive a grant thereof as aforesaid, with The Central Market Street Railway Company, under such rules and regulations as shall have been fixed by said city as aforesaid. Provided further, that said The Central Market Street Railway Company and its assigns, shall not have the right to grant to any other company, corporation or individual, permission to use any portion of its said tracks within said city without such permission having first been given by said city.

Sec. 23. The said city also reserves the right to grant to any other company, corporation or individual, permission to lay, on that part of Parsons avenue covered by this grant, at its or their own expense, any additional rail or rails, to be used by such company, corporation or individual in connection with the rail or rails, ties and roadbed of The Central Market Street Railway Company; the use thereof and the compensation to be paid to said The Central Market Street Railway Company and its assigns, for such use to be arrived at and determined by arbitration in the manner and with like effect

54 as provided by section 22 of this ordinance. Provided that the laying of such additional rail or rails shall be under the supervision and subject to the approval of the Board of Public Works of said city.

Sec. 24. The terms "The Central Market Street Railway Company," "said company," "the Grantee," and "the Company," wherever used in this ordinance, unless the connection clearly indicates a different intention, is intended, and shall be construed, to mean "The Central Market Street Railway Company and its assigns."

Wherever in this ordinance the term "the City of Columbus," "the city," or "said City" is used, said terms, unless the connection clearly indicates a different intention, is intended, and shall be construed, to mean "the city of Columbus, Ohio."

Sec. 25. This ordinance shall take effect and be in force from and after its passage and legal publication, and the filing with the City Clerk of said city by said company of a written acceptance of its terms and conditions, and the payment of said company of the cost of publication of this ordinance.

Passed January 21, 1901.

JAMES J. THOMAS,
President of the City Council.

Approved by the Mayor, January 22, 1901.
Attest:
JOHN T. BARR,
City Clerk.

55 EXHIBIT No. 3.

Columbus, Ohio, August 20, 1918.

To the City of Columbus, Ohio; George J. Karb, Mayor of said city; James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Arthur P. Lamneck, Joseph C. Nailor, Edgar L. Weinland, and Fred P. Zimpfer, Members of the City Council of said City, City Hall, Columbus, Ohio:

The Columbus Railway Power and Light Company, hereinafter referred to as This Company, has for sometime past been operating its street railway lines in the city of Columbus under two certain franchises granted by said city, the first to The Columbus Railway Company for a term of twenty-five years by ordinance approved February 6, 1901, sometimes called and hereinafter referred to as the Blanket Franchise, duly transferred and conveyed by that company to this company by deed dated January 29, 1914, and the second to The Central Market Street Railway Company for twenty-five years by ordinance approved January 22, 1901, hereinafter referred to as the Central Market Franchise, duly conveyed, after foreclosure proceedings, to this company by deed dated March 1, 1907.

This company is the owner of certain other franchises previously granted to predecessors in title of The Columbus Railway Company

but duly transferred and conveyed by said company to this company by the deed aforesaid of January 29, 1914, which said franchises were granted without limitation of time and are perpetual. The streets covered by these perpetual franchises are set forth in Section 20 of said Blanket Franchise ordinance under the heading "Perpetual Franchises." Said section reads as follows:

"The grants and provisions hereinbefore made and contained for the renewal of the franchise of the said The Columbus Railway Company on the streets and avenues hereinbefore mentioned in
56 section 1 of this ordinance, shall in all respects apply to the grants, rights, privileges and franchises of the predecessors in title of said The Columbus Railway Company, to construct, maintain and operate lines of street railway on Main street, (formerly called Friend Street) from High street to Rose Avenue; on State Street from High street to Grant avenue; thence in a northerly direction on Grant Avenue to Oak street; thence on Oak street in an easterly direction to Sherman avenue, (formerly called Bruce street); on Long street from High street in an easterly direction to Mulberry street, and thence in a southerly direction on Mulberry street from Long street to Broad Street; on Cleveland avenue in a northerly direction from Long street to Mt. Vernon avenue; thence in an easterly direction on Mt. Vernon avenue to Washington avenue; on West Broad street from High street to a point opposite the center of the east drive way to the Central Hospital for the Insane, (the same being the corporation line of the city of Columbus, as established by ordinance of the city of Columbus, passed on or about May 18, 1890); on Glenwood avenue in a southerly direction from Broad street to the Harrisburg pike; thence in a southwesterly direction on the Harrisburg pike to Green Lawn cemetery; as fully as if the routes and streets and avenues mentioned in this section were specifically mentioned and included in the first section of this ordinance, if, and so far as, the franchises in the streets and avenues mentioned in this section or either of them or any part thereof shall hereafter be judicially declared by a court of competent jurisdiction, or by any appellate court to which any suit brought to test any or all of said franchises shall be brought, may be carried by proceedings in error or on appeal, not to be franchises in perpetuity.

"It is expressly provided that nothing contained in this ordinance is intended, nor shall anything herein be construed to be, a
57 concession by said city of Columbus of the validity of any claim of said company to perpetual franchises to operate lines of street railroad in all or any of the streets and parts of streets named in this section.

"It is further expressly provided, that nothing contained in this ordinance shall be pleaded or considered to be a bar to any suit or suits which may hereafter be brought in any court or courts of competent jurisdiction, seeking to test the validity of any claim or claims to said company to perpetual franchises to operate any line or lines of street railroad upon any of the streets or parts of streets mentioned in this section."

Under the provisions of the Blanket Franchise and the Central Market Franchise, this company has for a number of years been issuing and selling eight tickets for twenty-five cents and giving universal free transfers thereon, which represents a lower street railway fare than is in force in any city in the United States and is under present circumstances non-compensatory and confiscatory.

The street railway property of this company is worth more than twelve millions of dollars on any reasonable basis of investment or physical value. The bonds outstanding fairly chargeable against the street railway property amount to $7,225,000 on which the annual interest charge amounts to over $333,000. Under the law, this company is entitled to earn from the operation of its street railway lines a fair return upon the value of the property which it employs in furnishing street railway service to the people of the city of Columbus.

Recently the operating expenses of this company, as of all other street railway companies, have greatly increased, owing to the increased and increasing cost of all materials and supplies, in many instances more than one hundred per cent, and to the higher wages that all such companies have been required to pay to their
58 employes. The taxes and necessary replacement and other depreciation charges have also materially increased. Take, for example, the coal bill; in the year 1915, this company paid for coal required to operate its street railway lines the sum of $60,164; the bill, in the year 1916, was the sum of $81,354; and in the year 1917, the bill increased to the sum of $234,838. Also, the wage account of the railway employes of this company, in the year 1916, amounted to the sum of $806,336; but in the year 1917, it had increased to the sum of $887,994. These large increases in operating and maintenance expenses have resulted in corresponding decreases in the net earnings of this company. Its street railway net earnings for the twelve months ending June 30, 1918, after deducting operating expenses and taxes and setting aside a proper amount to represent depreciation, were only the sum of $301,987, which was not enough to pay the interest on the bonds outstanding properly chargeable against the street railway property of this company.

In the month of June, 1918, railway employes of this company demanded higher wages, and, after some negotiations, the controversy was submitted for arbitration to the National War Labor Board. By the decision of that Board, rendered July 31, 1918, the wages of the railway employes of this company were increased over fifty per cent, resulting in an increase of more than $560,000 over the highest amount ever paid by this company to its railway employes in any one year. With this increase, the wages required to be paid by this company to its railway employes will be more than $1,500,000 per year.

It will thus be seen, that although this company was not earning a fair return on its street railway property prior to the wage increase fixed by the National War Labor Board, the added burden of the Board's wage award will result in leaving this company without any

net earnings whatever. In fact, its gross earnings will fall
59 short by more than $250,000 of meeting its operating expenses, without allowing anything whatever for interest on its bonds, which interest must be paid.

This company is a public utility upon which the law imposes certain duties and obligations, including the duty of maintaining its property in good order and repair, so that it may render adequate and satisfactory service to the public. This company can not do this unless it receives sufficient revenue from the operation of its cars, which means that the rates must be adequate. The rates prescribed in those two franchise ordinances are inadequate and confiscatory, and all rights of the city and of the public thereunder are and must be subject and subordinate to the provisions of the Fourteenth Amendment to the Constitution of the United States prohibiting the State or any municipality therein from depriving this company of its property without due process of law, that is, in the present case, from forcing upon this company inadequate and confiscatory rates of fare.

On February 25, 1918, this company, appreciating the situation then existing, requested in writing the city council of the city of Columbus to authorize this company to charge higher rates, but this request was summarily refused. A later request for relief was also refused, notwithstanding the belief expressed by the Mayor and some members of the City Council that relief should be granted.

Increased revenue and proper compensation for service rendered are necessary in order that this company may continue to perform its public duties. And this fact was recognized by the National War Labor Board, which in its award granting large increases in the wages of this company's railway employe's said:

"This increase in wages will add substantially to the operating cost of the company and will require a reconsideration by the proper regulating authority of the fares which the company is allowed by
60 law to collect from its passengers. We make part of this award the words we have used in the Cleveland case: We have recommended to the President that special congressional legislation be enacted to enable some executive agency of the Federal Government to consider the very perilous financial condition of this and other electric street railways of the country, and raise fares in each case in which the circumstances require it. We believe it to be a war necessity justifying Federal interference. Should this be deemed unwise, however, we urge upon the local authorities and the people of the locality the pressing need for such an increase adequate to meet the added cost of operation."

And again that Board in its award said:

"In justice the public should pay an adequate war compensation for a service which can not be rendered except for war prices. The credit of these companies in floating bonds is gone. Their ability to borrow on short notes is most limited. In the face of added expenses which this and other awards of needed and fair compensation to the employes will involve, such credit will completely disappear. Bank-

rup cy, receiverships and demoralization, with failure of service, must be the result. Hence our urgent recommendation on this head."

This company must now refuse to continue the plan of issuing and selling eight tickets for twenty-five cents with universal free transfers, and now hereby surrenders, relinquishes and cancels the aforesaid Blanket Franchise and the aforesaid Central Market Franchise, and it will no longer operate its cars thereunder. It will hereafter consider and hold itself a tenant at sufferance in those streets which are not covered by its perpetual franchises, and it will withdraw from those streets whenever the city notifies it to do so. In order to give street railway service to the people of the city of Columbus, this company will continue to operate its street railway lines, but not
61 under said two franchises or either of them, upon all of the streets of the city until notified by it to withdraw from those streets not covered by the aforesaid perpetual franchises.

This company does hereby give further notice to the city that it will at once discontinue the sale of eight tickets for twenty five cents and the giving of universal free transfers and that it will hereafter charge five cents for a single ride and one cent for each transfer, transfer slips to be used at designated transfer points. In regard to the tickets heretofore sold and now outstanding in the hands of the public, this company will accept and honor them as heretofore.

Respectfully submitted by order of the Board of Directors,

THE COLUMBUS RAILWAY, POWER & LIGHT COMPANY.

By S. G. McMEEN, *President.*

62 And afterwards, to-wit: on the 16th day of September, A. D. 1918, came the Plaintiffs, by their solicitors, and filed in the Clerk's Office of said Court, their certain Motion for Temporary Restraining Order and Preliminary Injunction, which said motion is clothed in the words and figures following, to-wit:

Motion for Temporary Restraining Order and Preliminary Injunction,

In the United States District Court, Southern District of Ohio, Eastern Division.

No. 106.

I. TUCKER BURR, WINTHROP BURR, A. LAWRENCE PIERSON, Thomas B. Gannett, Jr., Constantine Hutchins, Richard Austin, James W. Wheeler, and William J. Sturgis, Partners Doing Business under the Firm Name and Style of Parkinson & Burr, Plaintiffs,

vs.

THE CITY OF COLUMBUS, OHIO, a Municipal Corporation of the State of Ohio; George J. Karb, Mayor of said City; Henry L. Scarlett, City Solicitor of said City; James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Naiior, Edgar L. Weinland, Arthur B. Lamneck, and Fred P. Zimpfer, Members of the City Council of said City, Defendants.

Motion for Temporary Restraining Order and Preliminary Injunction.

The plaintiffs in the above entitled suit now hereby move the court to grant it, pending the suit, a temporary restraining order and preliminary injunction against the defendants, and each of them, their officers, servants, employes and agents, and their respective successors in office, as prayed for in the bill of complaint herein.

WILLIAM O. HENDERSON,
HENRY J. BOOTH,
HENDERSON & BURR,
BOOTH, KEATING, POMERENE & BOULGER,
Solicitors and Counsel for Plaintiffs.

JOSEPH S. CLARK,
HENRY A. McCARTHY,
Of Counsel.

63 And afterwards, to-wit: on the 23rd day of September, A. D. 1918, came the Defendants, by their Solicitor, and filed in the Clerk's Office of said Court, their certain Motion to Dismiss, which said Motion is clothed in the words and figures following, to-wit:

Motion to Dismiss.

In the United States District Court, Southern District of Ohio, Eastern Division.

In Equity.

No. 106.

I. TICKER BURR, WINTHROP BURR, A. LAWRENCE PIERSON, Thomas B. Gannett, Jr., Constantine Hutchins, Richard Austin, James W. Wheeler, and William J. Sturgis, Partners Doing Business under the Firm Name and Style of Parkinson & Burr, Plaintiffs,

vs.

THE CITY OF COLUMBUS, OHIO, a Municipal Corporation of the State of Ohio; George J. Karb, Mayor of said City; Henry L. Scarlett, City Attorney and City Solicitor of said City; James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck, and Fred. P. Zimpfer, Members of the City Council of said City, Defendants.

Motion to Dismiss.

Now come all the defendants in the above entitled action, and move the Court to dismiss this action and that they take their costs in this suit incurred for the following reasons:

64

I.

The plaintiffs' bill does not show that any Federal question is made for the consideration of this court.

II.

That there is insufficiency of fact to constitute a valid cause of action in equity against these defendants, or either of them.

III.

The bill does not state any facts which show that the Fourteenth Amendment to the Constitution of the United States has been violated, or that any right of the plaintiff under the amendment has been invaded by the defendants, or either of them.

HENRY L. SCARLETT,
City Attorney of Columbus, Ohio,
Solicitor for Defendants.

DAVID F. PUGH,
J. A. GODOWN,
Of Counsel.

65 And afterwards, to-wit: on the 10th day of October, A. D. 1918, there was filed in the Clerk's Office of said court, a certain affidavit in this cause, which said affidavit is clothed in the words and figures following, to-wit:

Affidavit of J. D. Mills.

In the United States District Court, Southern District of Ohio, Eastern Division.

No. 106.

I. TUCKER BURR, WINTHROP BURR, A. LAWRENCE PIERSON, Thomas B. Gannett, Jr., Constantine Hutchins, Richard Austin, James W. Wheeler, and William J. Sturgis, Partners Doing Business under the Firm Name and Style of Parkinson & Burr, Plaintiffs,

vs.

THE CITY OF COLUMBUS, OHIO, a Municipal Corporation of the State of Ohio; George J. Karb, Mayor of said City; Henry L. Scarlett, City Attorney and City Solicitor of said City; James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck, and Fred P. Zimpfer, Members of the City Council of said City, Defendants.

Affidavit.

STATE OF OHIO,
Franklin County, ss:

J. D. Mills being first duly sworn, deposes and says that the paper writing, consisting of two pages which is hereto attached and made a part hereof, marked "A," is a true and correct copy of a letter written and mailed on or about the 2nd day of October, 1918, to the Honorable Woodrow Wilson, President of the United States by the
66 Honorable George J. Karb, as Mayor of the City of Columbus, Ohio, stating the present emergency existing in the City of Columbus in respect to the street railway situation.

Further affiant saith not.

J. D. MILLS.

Sworn to before me and subscribed in my presence by the said J. D. Mills, this 10 day of October, A. D. 1918.

[SEAL.] SHERMAN B. RANDALL,
Notary Public in and for Franklin County, Ohio.

67 October 2nd, 1918.

Hon. Woodrow Wilson, President of the United States, Washington, D. C.

My Very Honored & Esteemed Sir: It is with profound regret that I bring to you for adjustment, an internal affair which has gone, it seems to me, beyond the possibility of internal settlement. I regret exceedingly that conditions are such as appeal to me to call upon you to exercise locally, the great power that has been vested in you by Congress to meet war time necessities.

Some eighteen years ago, the Council of this city passed a street car franchise under the terms of which the company is permitted at this time, to charge 5¢ for cash fares and to sell eight tickets for 25¢ with universal transfer upon either. This is probably as low a fare as has been enjoyed by any city in the United States.

Since the declaration of war the scarcity and cost of material and labor, the latter having been radically increased in August by the award of the War Labor Board, has so increased the cost of operation the company claims, that the furnishing of transportation at the prescribed rates is at a loss and at a confiscation of its property. In or about last March, the company made application to the City Council for such change in its franchise as would permit it to charge a higher fare. At another date, as a result of inaction on the part of the Council, the company asked that it be permitted to charge a rate of six tickets for 25¢ with universal transfer. Later, and because of like inaction on council's part, the company asked the right to charge a straight 5¢ fare. Various attempts were made by
68 the company to secure this relief until finally, I believe it was in June or July, it asked the privilege of charging a rate of 5¢ straight for the period of six months only. I have, in communication to Council and in interviews in the press, urged action along these lines. The matter has been before Council almost weekly, except during its vacation period in August, and yet there seems to be no possibility of that body arriving at any agreement on the matter. The membership of this body is composed of seven men elected at large.

The City Attorney, representing the city before the U. S. Court, in defense of the franchise accepted by the company eighteen years ago, has won his case against the company on first trial. The company had notified Council that it forfeited its franchise except as to those streets on which it claims perpetual rights. It notified the Council and the Mayor that it stood ready to withdraw its cars from these streets whenever ordered to do so. At the same time it refused to sell any more tickets at the rate of 8 for 25¢, and substituted a cash fare of 5¢ and an extra penny for transfer privilege, but accepting all tickets on usual basis that were in the hands of citizens. It claimed the right to do this under one of the amendments of the United States Constitution, which in substance prohibits states, counties or municipalities from doing those things which would confiscate the property of a citizen. In opposition to the company's

claims the city attorney raised the issue that the grounds given were not sufficient to warrant the giving up of the franchise contract and the court ruled in his favor. The Judge, I understand, indicated at the same time, that Council should provide some method of relief for the company and the city attorney has advised Council to
69 this effect and has urged it. The Public Utilities Commission of this state claims to be without jurisdiction in the matter. The latest act of Council on the matter has been to appoint a committee to secure and report to it, through an expert it will select, as to the company's earnings, &c.

In writing to you I am not interested so much in what the true facts may be as to the company's claims nor as to what kind of a franchise it should have to meet present condition or conditions which may prevail later but present time conditions are so serious; so potent in their possibility to threaten the general peace of the city; so dangerous, in fact, that but the moment, the man and the incident may be necessary to cause that explosion which should not be permitted to occur, and that distress to business which we cannot afford to have during the present serious work of the government. At the present time, and since the company made this change, thousands of people are riding the cars without paying fares. The company has instructed its conductors not to put off any passenger who presents a quarter and demands eight tickets therefor. There may be conductors not equipped to handle irritated passengers and irritated passengers who want to argue their rights with the conductor. With cars crowded with passengers, as they are, the opportunity is there for trouble.

The company claims that the final step taken was made necessary by the action of the War Board in increasing the wages of its men thus adding more than $500,000.00 annually to its running expenses. It has also pointed out the greatly increased cost of all materials used by it in the service. Last winter, due to transportation troubles, the coal supply obtainable by the company was
70 so limited that service had to be greatly reduced and at times completely abandoned. The company had trouble too with its power plants with like results. The result is that much feeling was created against the company. Our city charter provides for referendum. If Council should enact legislation to relieve the company, a referendum would undoubtedly be demanded and campaign would but add to the opportunity for trouble.

As I have said, it seems to me that a situation has been reached when settlement of this question is not within the power of local officials and that preservation of peace, the question of justice as between non-paying and paying passengers, the maintenance of service and conservation of the property of the company, require the matter to be taken under control by the government during the existence of the war.

Your very urgent attention is earnestly solicited.

Very respectfully,

GEO. J. KARB, *Mayor.*

71 And afterwards, to-wit: on the 10th day of Octoberm A. D. 1918, there was filed in the Clerk's Office of said court, a certain Affidavit in this cause, which said Affidavit is clothed in the words and figures following, to-wit:

Affidavit of E. W. Doty.

United States District Court, Southern District of Ohio, Eastern Division.

No. 106.

I. TICKER BURR et al., Plaintiffs,

vs.

THE CITY OF COLUMBUS, a Municipal Corporation of the State of Ohio, et al., Defendants.

Affidavit of E. W. Doty in Support of Motion for Temporary Restraining Order.

STATE OF OHIO,
Franklin County, ss:

E. W. Doty, being first duly sworn, says that the sheet which is hereto attached marked "Exhibit A" and made a part hereof, contains a list of cities in the United States and in Canada in which street railway fares have been advanced within the last few months and that the statements therein contained are true, subject only to the qualification that in a few instances still further increases may have been made within the last few weeks.

E. W. DOTY.

Sworn to before me by E. W. Doty and by him signed in my presence this 10th day of October, 1918.

[SEAL.] HARRY M. RUNKLE,
Notary Public, Franklin County, Ohio.

72 EXHIBIT A.

Street Car Service.

During the past year 244 cities in 37 states and Canada have patriotically met the problem of higher cost of the car-ride by increasing the rate of fare. In 203 of these 244 cities the fare is more then 5 cents. In addition, *these* are 18 cities where workingmen's reduced rate tickets have been abolished.

We give the list of cities who have solved this important problem in the only possible way by increasing the rate of street car fare. It shows among other things that Columbus is the victim of conditions that are widespread and not local.

Cities in Which a 10-Cent Fare is Being Charged.

Tacoma, Washington (on Municipal lines). Manistee, Mich. Spencer, Mass.

Cities in Which an 8-Cent Fare is Being Charged.

Reading, Pa. Scranton, Pa. Wilkes-Barre, Pa.

Cities in Which a 7-Cent Fare is Being Charged With One Cent For Transfer.

Newark, N. J.
Paterson, N. J.
Camden, N. J.
Elizabeth, N. J.
Passaic, N. J.
Bayonne, N. J.
Perth Amboy, N. J.
Orange, N. J.
Plainfield, N. J.
New Brunswick, N. J.
Hackensack, N. J.
Rahway, N. J.

Cities in Which a 7-Cent Fare is Being Charged.

Cambridge, Mass.
Tacoma, Wash.
Boston, Mass.
Somerville, Mass.
Manchester, N. H.
Malden, Mass.
Chelsea, Mass.
Newton, Mass.
Everett, Mass.
Joliet, Ill.
Brookline, Mass.
Waltham, Mass.
Meridian, Miss.
Ocean City, N. J.
Bartlesville, Okla.
Mahanoy City, Pa.
Ogdensburg, N. Y.
Woburn, Mass.
Augusta, Me.
Watertown, Mass.
S. Framingham, Mass.
Arlington, Mass.
Waterville, Me.
Winthrop, Mass.
Middleborough, Mass
Lexington, Mass.
Canton, Mass.
Girardville, Pa.
Mauch Chunk, Pa.
Sharon, Mass.
Brookfield, Mass.
Anderson, S. C.
Salamanca, N. Y.
Durham, N. C.
Wilmington, N. C.
Raleigh, N. C.

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Wilmington, N. C.
Shenandoah, Pa.
Lewiston, Me.
Medford, Mass.
Chambersburg, Pa.
Carlisle, Pa.
Keene, N. H.
Natick, Mass.
Salem, N. C.
Charlotte, N. C.
Meridian, Miss.

Cities Which Have a 6-Cent Central Zone, With an Additional Charge for Rides Outside Thereof.

Fall River, Mass.
Lowell, Mass.
Lynn, Mass.
Lawrence, Mass.
Brockton, Mass.
Malden, Mass.
Salem, Mass.
Haverhill, Mass.
Chelsea, Mass.
Quincy, Mass.
Taunton, Mass.
Gloucester, Mass.
Beverly, Mass.
Peabody, Mass.
Melrose, Mass.
Hyde Park, Mass.
Springfield, Mass.
Montpelier, Vt.
Barre, Vt.
Trenton, N. J.
Keyport, N. J.
Baltimore, Md.
Salt Lake City, Utah.
Berkeley, Calif.
Alameda, Calif.
Oakland, Calif.
Piedmont, Calif.
Emeryville, Calif.
San Leandro, Calif.
Edmonton, Can.
Montreal, Can.

Cities in Which a 6-cent Fare is Being Charged.

St. Louis, Mo.
Kansas City, Mo.
Portland, Ore.
Vancouver, Canada.
New Haven, Conn.
Bridgeport, Conn.
New Bedford, Mass.
Hartford, Conn.
Reading, Pa.
Kansas City, Kan.
Wilmington, Del.
Waterbury, Conn.
Erie, Pa.
Atlantic City, N. J.
Saginaw, Mich.
New Britain, Conn.
McKeesport, Pa.
Chester, Pa.
Lexington, Ky.
Jackson, Miss.
Aurora, Ill.
Stamford, Conn.
Easton, Pa.
Poughkeepsie, N. Y.
Mt. Carmel, Pa.
Battle Creek, Mich.
Meriden, Conn.
Elgin, Ill.
Nashua, N. H.
Norwalk, Conn.
Hagerstown, Md.
Paducah, Ky.
Middletown, Conn.
Danbury, Conn.
White Plains, N. Y.
Pottsville, Pa.
Duquesne, Pa.
Northampton, Mass.
Oil City, Pa.
Peekskill, N. Y.
Torrington, Conn.
Sioux Falls, S. D.
Woburn, Mass.
Ithaca, N. Y.
Cairo, Ill.
Fairmont, W. Va.
Jacksonville, Ill.
Connellsville, Pa.
Chickasha, Okla.
Newburyport, Mass.
Ansonia, Conn.
Rutland, Vt.
Hornell, N. Y.
Milford, Mass.
Naugatuck, Conn.
Albuquerque, N. M.
Meadville, Pa.
Plymouth, Mass.
Geneva, N. Y.
Ossining, N. Y.
Dover, N. H.
Wakefield, Mass.
Greenfield, Mass.
Laurel, Miss.
Beacon, N. Y.
Latrobe, Pa.
Frederick, Md.
Danvers, Mass.
Rochester, N. H.
Derby, Conn.
Athol, Mass.
Braintree, Mass.
Claremont, N. H.
Maynard, Mass.
Stoughton, Mass.
Branford, Conn.
Amherst, Mass.
Bellows Falls, Vt.
Waverly, N. Y.
Randolph, Mass.
Houston, Tex.
Kankakee, Ill.
Galveston, Tex.
Racine, Wis.
Oakland, Calif.
Harrisburg, Pa.
Denver, Colo.
Fresno, Calif.
Albany, N. Y.
Wildwood, N. J.
Macon, Ga.

74 Cities Which Have a Central 5-cent Zone, With an Additional Charge for Rides Outside Thereof.

Pittsburgh, Pa.
Milwaukee, Wis.
Providence, R. I.
Springfield, Mass.
Holyoke, Mass.
Pawtucket, R. I.
Woonsocket, R. I.
Norwich, Conn.
Chicopee, Mass.
New London, Conn.
Westfield, Mass.

Cities Having a 5-cent Fare, With an Additional Charge of 1 Cent for a Transfer.

Cleveland, Ohio.
Jersey City, N. J.
Toledo, Ohio.
Hoboken, N. J.

Cities in Which Reduced Rate Tickets Have Been Abolished and a Straight 5-cent Fare is Charged.

Seattle, Wash.
Des Moines, Ia.
Duluth, Minn.
St. Joseph, Mo.
Evansville, Ind.
Altoona, Pa.
Roanoke, Va.
Decatur, Ill.
Joliet, Ill.
Quincy, Ill.
Everett, Wash.
Columbia, S. C.
Lynchburg, Va.
Danville, Ill.
Sheboygan, Wis.
Bloomington, Ill.
Muncie, Ind.
Galesburg, Ill.
Anderson, Ind.
New Albany, Ind.
Shamokin, Pa.
Fon du Lac, Wis.
Asheville, N. C.
Marion, Ind.
Greensboro, N. C.
Kingston, Canada.
Owensboro, Ky.
Vincennes, Ind.
Muscatine, Ia.
Hot Springs, Ark.
Port William, Canada.
Bluefield, W. Va.
Champaign, Ill.
Bridgeton, N. J.
Cortland, N. Y.
High Point, N. C.
Elwood, Ind.
Jeffersonville, Ind.
Urbana, Ill.
Waynesboro, Pa.
Tyrone, Pa.

Cities in Which Workmen's Reduced Rate Tickets Have Been Abolished.

Toledo, Ohio.
Shamokin, Pa.
Biddeford, Me.
Gary, Ind.
Greensboro, N. C.
Greenfield, Mass.
Bluefield, W. Va.
High Point, N. C.
Sanford, Me.
Concord, N. C.
Claremont, N. H.
Salisbury, N. C.
Valparaiso, Ind.
Stoughton, Mass.
Randolph, Mass.
Spencer, N. C.
Hadley, Mass.
Graham, Va.

THE COLUMBUS RAILWAY, POWER & LIGHT COMPANY.

75 And afterwards, to-wit: on the 10th day of October, A. D. 1918, there was filed in the Clerk's Office of said Court, a certain Certified Copy of Articles of Incorporation of The Columbus Railway Company, which said Certified Copy is clothed in the words and figures following, to-wit:

Certified Copy of Articles of Incorporation of The Columbus Railway Company.

Corporation for Profit. Form AA. (Preferred Stock.)

These Articles of Incorporation of The Columbus Railway Company

Witnesseth, That we, the undersigned, *all of whom are citizens of the State of Ohio, desiring to form a corporation, for profit, under the general corporation laws of said State, do hereby certify:

First. The name of said corporation shall be The *The* Columbus Railway Company.

*"All" or "a majority."

Second. Said corporation is to be located at Columbus in Franklin County, Ohio, and its principal business there transacted.

Third. Said corporation is formed for the purpose of acquiring, by purchase or lease, constructing, extending, owning, operating and maintaining street railroads, to be operated by electricity, or other motive power on, over and through the streets and alleys of the City of Columbus, Franklin County, Ohio, and the suburbs thereof, and to, in and through the villages and hamlets in said County.

Fourth. The Capital stock of said corporation, common and preferred, shall be Seven Million Dollars ($7,000,000) consisting of thirty five thousand (35,000) shares of common stock of the par value of One Hundred Dollars ($100.00) each, and thirty-five thou-
sand (35,000) shares of preferred stock of the par value of
76 One Hundred Dollars ($100.00) each; the purchasers and owners of the preferred stock shall be entitled to a dividend of five per cent. per annum out of the surplus profits for each year in preference to all other stockholders.

In Witness Whereof, We have hereunto set our hands, this eighteenth day of August, A. D. 1899.

P. W. HUNTINGTON.
DAVID S. GRAY.
NATHAN B. ABBOTT.
WILLIAM F. BURDELL.
HOWARD C. PARK.

77 THE STATE OF OHIO,
County of Franklin, ss:

Personally appeared before me, the undersigned, a Notary Public in and for said county, this 18th day of August A. D. 1899 the above-named P. W. Huntington, David S. Gray, Nathan B. Abbott, William F. Burdell and Howard C. Park, who each severally acknowledged the signing of the foregoing articles of incorporation to be his free act and deed, for the uses and purposes therein mentioned.

Witness my hand and official seal on the day and year last aforesaid.

[NOTARIAL SEAL.] CHARLES F. PRYOR,
Notary Public in and for
Franklin County, Ohio.

(10¢ I. R. Stamp, Canc.)

THE STATE OF OHIO,
County of Franklin, ss:

I, Chas. F. Galloway, Clerk of the Court of Common Pleas, within and for the county aforesaid, do hereby certify that Charles F. Pryor whose name is subscribed to the foregoing acknowledgment as a Notary Public was, at the date thereof, a Notary Public, in and

for said county, duly commissioned and qualified, and authorized as such to take said acknowledgment; and further, that I am well acquainted with his handwriting, and believe that the signature to his acknowledgment is genuine.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Columbus, this 18" day of August, A. D. 1899.

(10¢ I. R. Stamp, Canc.)

[CLERK'S SEAL.]

CHAS. F. GALLOWAY, *Clerk,*
By JOS. W. WICKHAM, *Deputy.*

78 (*Certificate under Section* 906, *Revised Statutes of the United States.*)

UNITED STATES OF AMERICA,
State of Ohio:

Office of the Secretary of State.

I, William D. Fulton, Secretary of State of the State of Ohio, and being the officer who, under the Constitution and Laws of said State, is duly constituted the keeper of the records of articles of incorporations of all companies incorporated under the laws thereof, and the records of all papers relating to the creation of said incorporated companies, and empowered to authenticate exemplifications of the same, do hereby certify that the annexed instrument is an exemplified copy, carefully compared by me with the original record now in my official custody as Secretary of State, and found to be true and correct, of the Articles of Incorporation of The Columbus Railway Company filed in this office on the 19th day of August, A. D. 1899, and recorded in Volume 78, Page 179, of the Records of Incorporations; that said exemplification is in due form and made by me as the proper officer, and is entitled to have full faith and credit given it in every court and office within the United States.

In testimony whereof, I have hereunto attached my official signature and the Great Seal of the State of Ohio, at Columbus, this 9th day of October, A. D. 1918.

[SEAL.]

WM. D. FULTON,
Secretary of State.

79 And afterwards, to-wit: — there was filed in the Clerk's Office of said Court a certain Certified Copy of Articles of Incorporation of The Central Market Street Railway Company, which said Certified Copy is clothed in the words and figures following, to-wit:

Certified Copy of Articles of Incorporation of The Central Market Railway Company.

These Articles of Incorporation of The Central Market Street Railway Company

Witnesseth, That we, the undersigned, *all of whom are citizens of the State of Ohio, desiring to form a corporation, for profit, under the general corporation laws of said State, do hereby certify:

First. The name of said corporation shall be The Central Market Street Railway Company.

Second. Said corporation is to be located at Columbus in Franklin County, Ohio, and its principal business there transacted.

Third. Said corporation is formed for the purpose of constructing, maintaining, operating and owning a line of street railway for the carrying of passengers, baggage, express and freight, to be run by electricity or some motive power other than steam or horse, with single or double tracks, side tracks, turnouts, spurs, switches, turntables, offices, stations, depots, power houses, barns, machine and repair shops, ware houses, telephone and telegraph lines necessary for its use; of leasing and using the tracks and facilities of other railway companies; of leasing and sub-letting the use of its tracks and facilities to other railway companies; of acquiring and holding real estate and other accessories and appliances such as may be necessary and proper to carry out the purposes and privileges herein men-
80 tioned. The said line of railway will be located in and upon the streets, alleys, public ways and private grounds of the city of Columbus, Franklin County, Ohio, and having the City of Columbus as one of its termini, thence through the counties of Franklin and Fairfield to the city of Lancaster, Ohio and through the counties of Franklin, Pickaway, Ross, Pike and Scioto to the city of Portsmouth, Ohio, with the right and purpose to construct, maintain and operate such branches or spur tracks from said main line as may be hereafter determined upon and authorized, and to do all other things necessary and proper to carry out the purposes and exercise the privileges hereinbefore specified.

Fourth. The capital stock of said corporation shall be Ten Thousand Dollars ($10,000.00) divided into One Hundred (100) shares of One Hundred Dollars ($100.00) each.

In witness whereof, we have hereunto set our hands this fifth day of January, A. D. 1901.

S. B. HARTMAN.
O. A. SCHENCK.
LOUIS SEIDENSTICKER.
WM. H. LUCHTENBERG.
BENJAMIN MONETT.

*"All" or "a majority."

81 THE STATE OF OHIO,
County of Franklin, ss:

Personally appeared before me, the undersigned, a Notary Public in and for said county, this fifth day of January, A. D. 1901, the above named S. B. Hartman, O. A. Schenck, Louis Seidensticker, Wm. H. Luchtenberg and Benjamin Monett who each severally acknowledged the signing of the foregoing articles of incorporation to be his free act and deed, for the uses and purposes therein mentioned.

Witness my hand and official seal on the day and year last aforesaid.

[NOTARIAL SEAL.] W. V. BAKER,
Notary Public.

(10¢ I. R. Stamp, Canc.)

THE STATE OF OHIO,
County of Franklin, ss:

I, John W. McCafferty, Clerk of the Court of Common Pleas within and for the county aforesaid, do hereby certify that W. V. Baker whose name is subscribed to the foregoing acknowledgment as a Notary Public was at the date thereof a Notary Public in and for said county, duly commissioned and qualified, and authorized as such to take said acknowledgment; and further that I am well acquainted with his handwriting, and believe that the signature to said acknowledgment is genuine.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Columbus, Ohio, this 5″ day of January, A. D. 1901.

[CLERK'S SEAL.] JOHN W. McCAFFERTY, *Clerk.*

(10¢ I. R. Stamp, Canc.)

82 (*Certificate under Section* 906, *Revised Statutes of the United States.*)

UNITED STATES OF AMERICA,
State of Ohio:

Office of the Secretary of State.

I, William D. Fulton, Secretary of State of the State of Ohio, and being the officer who, under the Constitution and Laws of said State, is duly constituted the keeper of the records of articles of incorporations of all companies incorporated under the laws thereof, and the records of all papers relating to the creation of said incorporated companies, and empowered to authenticate exemplifications of the same, do hereby certify that the annexed instrument is an ex-

emplified copy, carefully compared by me with the original record now in my official custody as Secretary of State, and found to be true and correct, of the Articles of Incorporation of The Central Market Street Railway Company, filed in this office on the 5th day of January, A. D. 1901, and recorded in Volume 83, Page 537, of the Records of Incorporations; that said exemplification is in due form and made by me as the proper officer, and is entitled to have full faith and credit given it in every court and office within the United States.

In testimony whereof, I have hereunto attached my official signature and the Great Seal of the State of Ohio, at Columbus, this 9th day of October, A. D. 1918.

[SEAL.] WM. D. FULTON,
Secretary of State.

83 And afterwards, to-wit: on the 10th day of October, A. D. 1918, there was filed in the Clerk's Office of said Court certain Copies of Acceptances of Ordinances, which said Certified Copies are clothed in the words and figures following, to-wit:

Certified Copies of Acceptances of Ordinances.

To the City Council of the City of Columbus, Ohio:

We have the honor to inform your Honorable Body that at a meeting of the Board of Directors of The Columbus Railway Company, held this 29th day of April 1901, a resolution of which the following is a copy, was duly adopted by said Board:

"Resolved, that this, The Columbus Railway Company, accept and it does hereby accept each and all of the terms, provisions and requirements of the ordinance passed by the City Council of the City of Columbus, on February 4th, 1901, entitled 'An Ordinance No. 17,801, renewing to The Columbus Railway Company, for a term of twenty-five (25) years, its grants, rights, privileges and franchises, to maintain and operate its tracks and lines of street railroad upon the streets and avenues, and parts of streets and avenues, hereinafter mentioned, in the City of Columbus, Ohio, and prescribing the terms and conditions thereof and repealing the provisions of any and all ordinances and resolutions, and parts of ordinances and resolutions, inconsistent with the terms of this ordinance:' and that the President and Secretary of this Company be and they are hereby directed to file with the Clerk of said City a copy of this resolution as evidence of the acceptance in writing by this Company of each and all of the terms, provisions and requirements of said ordinance and to
84 certify that this Company accepts each and all of the terms, provisions and requirements of said ordinance."

We further certify that the said The Columbus Railway Company accepts in writing each and all of the terms, provisions and requirements of said ordinance.

In Witness Whereof, the President and Secretary have hereunto set their hands and affixed the corporate seal of said Company this 29th day of April, 1901.

[SEAL.] THE COLUMBUS RAILWAY COMPANY,
By ROBERT E. SHELDON, *President,*
By P. V. BURINGTON, *Secretary.*

I Hereby Certify That the foregoing is a true and correct copy of the acceptance by The Columbus Railway Company of the terms and conditions of An Ordinance No. 17,801 passed by the City Council of the City of Columbus, Ohio, February 4, 1901, as filed with the City Clerk of said City April 29, 1901, as shown by the records now on file in this office.

[SEAL.] JAS. J. THOMAS,
City Clerk of the City of Columbus, Ohio.

Office of the City Clerk, Columbus, Ohio, Oct. 10, 1918.

85 Columbus, Ohio, January 22, 1901.

To the Board of Public Works and City Council of the City of Columbus, Ohio:

The Central Market Street Railway Company hereby accepts the terms and conditions of the Ordinance passed by said Council on January 21st, 1901, entitled "An Ordinance No. 17802 Granting permission to The Central Market Street Railway Company, its successors and assigns, to construct, operate and maintain, a single or double track street railway with necessary sidetracks, curves, turnouts and switches, in the following streets in the City of Columbus, Ohio, to-wit: Rich street, Fifth street, Donaldson street, Livingston avenue, Mohawk street, Reinhard avenue, Jaeger street, Hanford street, Fourth street, Hosack street, Innis avenue, and Parsons avenue to the south corporation line of said City;" and transmits herewith a copy of the resolution adopted by the directors of said Company, authorizing this acceptance.

THE CENTRAL MARKET STREET RAILWAY,
By S. B. HARTMAN, *President.*

Whereas, the City Council of the City of Columbus, Ohio, on January 21st, 1901, passed an ordinance entitled "An Ordinance No. 17,802, Granting permission to The Central Market Street Railway Company, its successors and assigns to construct, operate, and maintain a single or double track street railway, with necessary side tracks, curves, turnouts and switches in the following streets in the City of Columbus, Ohio, to-wit: Rich street, Fifth street, Donaldson street, Livingston avenue, Mohawk street, Reinhard avenue, Jaeger street, Hanford street, Fourth street, Hosack street, Innis avenue and Parsons avenue to the south corporation line of said City," and

86 Whereas, said ordinance provides among other things as follows: "Sec. 25. This ordinance shall take effect and be in

force from and after its passage and legal publication and the filing with the City Clerk of said City, by said Company, of a written acceptance of its terms and conditions, and the payment of said Company of the cost of publication of this ordinance," and

Whereas, it is desirable that this Company enter into such proposed contract with said City by accepting the terms and conditions of said ordinance; therefore,

Be It Resolved by the Board of Directors of The Central Market Street Railway Company that this Board for and on behalf of said Company hereby accepts the terms and conditions of said ordinance No. 17802, and that as an evidence of the acceptance by said Company of the terms and conditions of said ordinance, a copy of this resolution and preamble be transmitted to and filed with the clerk of the City of Columbus, Ohio, and the President of this Company is hereby authorized and empowered in the name of and on behalf of this Company to sign a written acceptance of said ordinance.

Columbus, Ohio, Jan. 22, 1901.

I hereby certify that the foregoing is a full and correct copy of the preamble and resolution adopted by the Board of Directors of The Central Market Street Railway Company at a meeting of said Board held January 22, 1901.

O. A. SCHENCK, *Sec'y.*

Filed with City Clerk of the City of Columbus, Ohio, at 3:50 o'clock P. M., Jan. 22, 1901.

JOHN T. BARR,
City Clerk.

87 Presented to the City Council of the City of Columbus, Ohio, and ordered placed on file Jan. 28, 1901.

JOHN T. BARR,
City Clerk.

I Hereby Certify That the foregoing is a true and correct copy of the acceptance by The Central Market Street Railway Company of the terms and conditions of An Ordinance No. 17,802 passed by the City Council of the City of Columbus, Ohio, January 21, 1901, as filed with the City Clerk of said City January 22, 1901, as shown by the records now on file in this Office.

[SEAL.] ELINATHAN PETTIT,
Assistant City Clerk of the City of Columbus, Ohio.

Office of the City Clerk, Columbus, Ohio, Oct. 9, 1918.

And afterwards, to-wit: on the 10th day of October, A. D. 1918, an Entry was made on the Journal of said Court in this cause which said Entry is clothed in the words and figures following, to-wit:

Entry (2-337).

No. 106.

I. TUCKER BURR et al., Complainants,

vs.

THE CITY OF COLUMBUS et al., Defendants.

Entry.

This day this cause came on to be heard upon the motion for temporary restraining order and for preliminary injunction heretofore filed by the complainant herein, and on motion to dismiss filed by the defendants, which motions were argued by counsel for the respective parties and said matters taken under advisement by the court.

88 And afterwards, to-wit: on the 29th day of October, A. D. 1918, the Opinion of Judge Hollister was filed in the Clerk's Office of said Court in this cause, which said Opinion is clothed in the words and figures following, to-wit:

Opinion of Judge Hollister.

In the District Court of the United States, Southern District of Ohio, Eastern Division.

No. 106.

I. TUCKER BURR et al., Complainants,

v.

THE CITY OF COLUMBUS, OHIO, et al., Defendants.

Opinion.

Heard on motion of complainants for a preliminary injunction restraining the defendants, pending the suit, from in any way forcing or compelling, or attempting to force or compel, The Columbus Railway, Power & Light Company, a corporation of Ohio, hereinafter called the company, to operate its lines of street railway in the city of Columbus under the certain ordinances set out in the bill; and on defendants' motion to dismiss the bill.

The complainants are owners of mortgage bonds of the series of first mortgage bonds executed by the company.

It is assumed for the purposes of this case that complainants have the capacity to bring the suit, and, being citizens of different states

than Ohio, the court has jurisdiction to entertain it and make appropriate orders.

89 With the exception of parties plaintiff, this bill is in substance, and almost exactly in language, the same as the bill filed by the company in the suit instituted by it, in which Judge Westenhaver found, in an exhaustive opinion handed down September 20, 1918, that the court had no jurisdiction, in that no federal jurisdiction was involved, and that the bill, on the facts alleged, was without merit.

The changes in the bill are designed to make a stronger case than the allegations in the bill in the suit brought by the company presented. To the statement in that bill "the further operation of said company's street railway property at said rates of fare would be not only impracticable but impossible, both financially and otherwise" is added, "and would bankrupt said company within a short time." This bill includes also allegations, not found in that bill, showing that the franchise rate of fare is unfair, unreasonable and confiscatory, and the injury that would result to complainant's security in the event of bankruptcy. From the prayer is omitted the prayer in the company's bill that the city be enjoined from interfering with the possession or control of the street railway property. Other minor changes need not be noticed.

With the exception of the question of complainants' capacity to sue, Judge Westenhaver's opinion in the company's case is applicable to every issue presented in this case. Since I agree with his conclusions, it would be a useless task to again discuss all of the principles involved, or to set out at length the numerous authorities dealing with them. I have considered all of them, and the elaborate

90 briefs of counsel, worthy of so important a case, which, as one of counsel for complainants remarked at the opening of the argument, presents some novel considerations.

Some observations appropriate to these may not, however, be amiss.

The novel feature of prime importance lies in the claim of complainants that the doctrine of implied conditions in the law of contracts is applicable to the facts stated in the bill. The diligence of counsel has not discovered a case like it. The able opinion of Judge Killits in the Toledo Street Railway Case (August 2, 1918), of Judge Tuttle in the Detroit Street Railway Case (August 12, 1918), of Judge Chatfield in the Brooklyn case (September 9, 1918), and of Judge Allread in the Village of Fort Loramie case (July 9, 1918), are not applicable, for the reason that in all these the street railway franchises had expired. Here, the primary question in the case is, whether or not they have come to an end. If they have, then the consideration of these cases would be necessary, as well as the highly important case of the Denver Water Works, decided by the Supreme Court of the United States March 4, 1918, 246 U. S. 178. If the conclusion is right, that, under the authorities, the offer and acceptance of the franchises in question constitute a contract binding on both parties for the twenty-five years of their respective lives, then these cases have no application, unless the circumstances alleged are such as to bring into operation rules which excuse the performance of

a contract solemnly entered into. If such circumstances exist, it might be said, as it is in this case, that the franchises having come to an end by the nonfulfillment of conditions implied when the
91 contracts were made, an attempt to enforce the contracts and require the carrying of passengers at the agreed upon rate is the same as if the council had passed an ordinance prescribing confiscatory rates.

Whether or not there may be a difference between agreed rates and prescribed rates accepted by the grantee in such franchises as these, and whatever views may be entertained by courts of last resort in some of the states on the propriety of the grantee's bringing a contract, binding on the grantor, to an end because the agreement only requires operation at prescribed rates while the franchises are being enjoyed, is not, in Ohio, important; for, under the decisions to which Judge Westenhaver called attention, and especially the decision of the Supreme Court of the United States in the Cleveland Street Railway Case, 194 U. S. 517, in which Chief Justice White said (536), "we can see no escape from the conclusion, that the ordinances were intended to be agreements binding upon both parties definitely fixing the rates of fare which might be thereafter charged," the question is no longer, in a district court, open to debate.

At the conclusion of the arguments of counsel, the legal questions being presented at length and with much clearness, I had no doubt that the franchises were contracts for their full terms, but had some doubt of the correctness of the defendants' contention that the doctrine of implied conditions was not applicable to the facts of this case, both as to complainants' claim that the pending world-war and the consequential increased wage of labor to an ex-
92 tent that would bankrupt the company unless it received higher rates than the contract rates, and as to the action of the War Labor Board in fixing wages in an amount so large as to bring about the same result, could not have been in contemplation of either party at the time the contracts were entered into, and that therefore the contracts were at an end.

That doubt lingers still. It must be conceded by defendants that when the contracts were made, the parties could not have had in mind the possibility that years thereafter such a catastrophe as this war would have befallen the world, and that the extraordinary rise in the cost of living, resulting therefrom, would have required an advance in the cost of labor so great as, if operation under the franchises were continued at the contract rate, to bankrupt the company; or that what was in effect a governmental compulsory war board of arbitration would fix a confiscatory wage for labor.

If, to the facts involved in this concession, is applied what was said by Mr. Justice Matthews in Railway v. Hoyt, 149 U. S. 1, 15, and by Vaughan Williams, L. J., in Krell v. Henry, 2 L. R. K. B. (1903) 740, it will be appreciated that much may be said in support of complainants' position. In the former case it was said (15):

"But where the event is of such a character that it cannot be reasonably supposed to have been in the contemplation of the contract-

ing parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens."

93 And in the latter (749):

"I do not think that the principle of the civil law as introduced into the English law is limited to cases in which the event causing the impossibility of performance is the destruction or non-existence of some thing which is the subject-matter of the contract or of some condition or state of things expressly specified as a condition of it. I think that you first have to ascertain, not necessarily from the terms of the contract, but, if required, from necessary inferences, drawn from surrounding circumstances recognized by both contracting parties, what is the substance of the contract, and then to ask the question whether that substantial contract needs for its foundation the assumption of the existence of a particular state of things."

It is urged that when the contracts were made the city wished to get their benefits for twenty-five years, and the company expected to obtain the advantage of operation for twenty-five years. Thus the contracts were to be of mutual advantage for that length of time. It is argued that both parties knew, agreeing on the terms accordingly, that bankruptcy would make impossible the fulfillment of the contracts, and that its consequence would be disastrous to both parties; that they knew that wages were the greatest single item in the cost of operation; that they had in mind only such increases or decreases as might be expected in normal times; that if the rate of fare per passenger was low, such increases of labor as normal conditions might bring about would be compensated by the increased number of fares in a growing city such as was Columbus at the time the contract was entered into, and is now; and that the wages of labor in normal times was a condition implied from a consideration of the parties, the entire contract, its peculiar character, and from
94 all circumstances.

This argument carries counsel further than the circumstances of this case require, and if sound, would lead to the conclusion that any abnormal labor conditions of such a character as to bring about the bankruptcy of the contractor by rendering compliance impossible would excuse him from performance and bring his contract to an end. This cannot be. A frequent illustration of abnormality in labor conditions is strikes, and their often disasterous financial consequences to the employer of labor. No one would now say that strikes and their results, however serious the financial consequences, bring to an end the contractor's obligation to perform his contract requiring the employment of labor. For still less cause could one affirm that if, upon adjustment of the controversy, the contractor agrees on a wage so high that it would bankrupt him within a short time, he could terminate his contract.

The case finds no analogy in those cases in which it is held that a

contract for personal service comes to an end on the death of him who has contracted to perform it; or in those cases in which a fact must have been in the minds of the parties without which the express contract, silent on the subject, would not have been entered into, such as C. & O. R. Co. v. McKell, 209 Fed. Rep. 514, 522, (C. C. A. 6); Wheeling & L. E. R. Co. v. Carpenter, 218 Fed. Rep. 273, 285 (C. C. A. 6), in which express contracts by a railroad compaany with the proprietor of a coal mine on its road to take for itself for fuel purposes, or to haul away, a stipulated amount of coal, were held to embody implied agreements that the railroad company would supply sufficient cars to haul the stipulated amount of coal away; or in such cases as Krell v. Henry, in which the conclusion was, that, inasmuch as the letting of the windows was, as well understood by both parties, to permit the user to see King Edward's coronation procession, the indefinite postponement of that ceremony, because of the illness of the King, brought the contract to an end; or in the Seamen's Case, Liston, v. Steamship Carpathian, 2 L. R. K. B. (1915) 42, in which it was held that the seamen's contract for the entire voyage was, at their election, brought to an end before completion by the danger of capture by enemy ships, the threat of which was learned by the seamen at a port at which the ship touched during progress of the voyage, and from which the sailors refused to proceed except at an increased wage.

If there is any analogy presented by the Seamen's Case, it lies in the fact that in that case the danger of capture during the voyage was not in the minds of the ship-owner or the seamen when the shipping articles were agreed to; while in this case the certainty of bankruptcy growing out of conditions affecting wages brought about by the same war, could not have been contemplated by either party. Logically, if the Seamen's Case is applicable to this, and should be adopted as the law of such a case as this (it was decided in February, 1915) the way would be open for the destruction of innumerable contracts to carry out which the employment of labor is necessary and which the parties expected, and agreed, to carry out, whatever the condition of the labor market might be during performance. In my judgment, the Seamen's Case does not apply to this (it is regrettable that the opinion of the court does not discuss the question involved in it from the standpoint of principle or previous decisions); nor do I think what was said by Mr. Justice Matthews and Vaughan Williams, L. J., hereinbefore quoted, do apply or were intended to apply to any possible case which might arise. In those cases the parties did not have in mind, and there was no reason why they should, that in one, the particular circumstances over which they had no control might prevent the storing of the grain the railroad company agreed to deliver and was ready and willing to deliver; and, in the other, that the procession, to see which was the object of the contract, might not take place.

But the circumstances here present a different case. In the preparation for the bidding there were a number of prime factors the company had in mind in determining the rate at which it was willing to carry such passenger. That was based on a number of

considerations: The then population of Columbus; the rate of increase in the city's population, as shown by the census, and perhaps by interim statistics; and the cost of operation, including salaries, supplies, and especially wages. The great item of cost each year would be wages, seldom subject to diminution, and having in it even at that time potentialities of tremendous increase. What labor in this country would be demanding during twenty-five years was one of the most important questions to be debated by the promoters of complainants' predecessors.

97 On the figure to be paid in wages each year depended the great question of dividends, without at least the hope of which the franchises would not have been sought. Unexpected conditions in the labor market growing out of a war of such character as to have been beyond the anticipation of anyone, have thrown the carefully considered plan, which involved revenues greater than cost, out of adjustment; have reversed the contemplated ratio of revenue to cost, and have defeated the plan.

While the parties did not anticipate the happening of this war, yet the contractor might well have anticipated such rising wages, possible during twenty-five years from whatsoever cause, as might wreck the plan and precipitate bankruptcy. As in the law he would be required to guard himself against the consequences of non-fulfillment by reason of strikes, so here the contractor could have guarded itself against an increase in the cost of labor so great as to prevent his doing what he agreed to do. Contracts for future performance often contain a clause excusing the contractor from performance made impossible by future happenings over which he has no control.

Of course, the grantee here intended, expected and contracted to operate under the franchises for twenty-five years at the contract rate. Since to do this it was necessary that wages should be always at a figure which made performance possible, it was necessary, in my judgment, for the grantee of these franchises to have guarded against a situation which might happen, namely, the failure of reve-

98 nue to meet expenses through circumstances unanticipated and over which the grantee had no control.

This brings into application what was also said by Mr. Justice Matthews in Railway v. Hoyt, 149 U. S. 1, 14, 15;

"There can be no question that a party may by an absolute contract bind himself or itself to perform things which subsequently became impossible, or pay damages for the non-performance, and such construction is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor."

If this conclusion is sound, and I think it presents the better argument in the debate, then the doubt must be, and it is, so far as this court is concerned, resolved in favor of the defendants.

But, it is said, these wages were fixed at a confiscatory rate by the War Labor Board, and thereby the case is brought within the principle of Metropolitan Water Board v. Dick, Appeal Cases, 119, H. of L. (1917), 2 K. B. 1, and of Judge Ray's decision in the Knitting

Company Case, 250 Fed. Rep. 278, in which a contractor was excused from performance. In one, the English government commandeered the plant of a contractor to build water works, making it impossible for him to proceed with his contract. In the other, the Knitting Company's mill was, in effect, commandeered by the United States government, rendering the performance of its contracts with others impossible.

This is a different case. Here the government did not
99 interfere directly with the contract, or appropriate in any way the complainants' plant to any of the government's purposes. The vis major apparent in those causes is wholly lacking here. It is true that the requirement to submit to the arbitration of the War Labor Board was, in effect, compulsory, and its award binding, but it was not the award which brought about the condition which threatens the company with bankruptcy; it was the condition which made the award necessary which brought the result. Presumably the award was just. Any proper adjustment between the company and its employees would necessarily have been substantially, so far as results are concerned, the same sum as the award.

From what has been said, the conclusion must be that these franchises constitute valid contracts for twenty-five years from their date, binding on both parties; that the doctrine of implied conditions is not applicable to the circumstances of the case; that no federal question is involved, and that the bill is without merit.

It is urged that since the court has acquired jurisdiction through the diverse citizenship of the parties that a preliminary restraining order may issue, in view of the great existing public emergency growing out of the controversy between the city and the company. Whatever might be the power of the court in an action by the city against the company for specific performance to hold the situation in statu quo until the legal rights of the parties are determined, it is not called into exercise here, for reasons dealt with by Judge Westenhaver and for the reason that the court has no power to issue a preliminary restraining order in a case in which the court, on hearing the motion to dismiss, is of opinion that the complainant
100 has no cause of action.

The bill will be dismissed at complainants' costs. Necessarily, the motion for a preliminary injunction is denied.

We have been discussing legal rights cognizable by a court of equity. The allegations in the bill, however, present other aspects and involve considerations of the highest moment to the people of Columbus, to the public comfort, convenience and peace, as well as to the large interests of complainants now jeopardized by the situation unforseen by it and the city when the franchises were granted, and which, unhappily, the company's predecessors did not safeguard, although they should have done so. "The present emergency," Judge Westenhaver said in the company's case, "calls urgently for some kind of accommodation or temporary compromise between the parties." In that, and all that he says in that behalf, I agree, and may be permitted to express the hope that the city's representatives will meet with the representatives of the company in a spirit of ac-

commodation and compromise, and that the representatives of the company will meet with them and frankly disclose such facts as the city's representatives should know when the question of what would be a reasonable rate, under the present conditions, is discussed and agreed upon.

HOLLISTER,
District Judge.

October 28, 1918.

101 William O. Henderson, Henry J. Booth, Henderson & Burr, Booth, Keating, Pomerene & Boulger, Solicitors and Counsel for Complainants.

Joseph S. Clark, Henry A. McCarthy, of Counsel.

Henry L. Scarlett, City Attorney, and Pugh & Pugh, of Counsel for Defendants.

102 And afterwards, to-wit: on the 9th day of November, A. D. 1918, an Entry was made on the Journal of said Court in this cause, which said Entry is clothed in the words and figures following, to-wit:

Entry (2-343).

No. 106.

I. TUCKER BURR, WINTHROP BURR, A. LAWRENCE PIERSON, Thomas B. Gammett, Jr., Constantine Hutchins, Richard Austin, James W. Wheeler, and William J. Sturgis, Partners Doing Business under the Firm Name and Style of Parkinson & Burr, Plaintiffs,

vs.

THE CITY OF COLUMBUS, OHIO, a Municipal Corporation of the State of Ohio; George J. Karb, Mayor of said City; Henry L. Scarlett, City Attorney and City Solicitor of said City; James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck, and Fred F. Zimpfer, Members of the City Council of said City, Defendants.

Entry.

This cause coming on to be heard at this term on the plaintiffs' motion for a temporary restraining order and a preliminary injunction based on their verified bill and the affidavits and papers in support thereof, and on defendan's' motion to dismiss said bill for the reasons therein stated, and having been argued by counsel, it is now, upon consideration thereof, ordered, adjudged and decreed by the Court as follows: That the plaintiffs' said motion be and is
103 hereby overruled and denied; that said motion of the defendan's to dismiss this suit be and is hereby sustained; that this cause be and is hereby dismissed because the bill does not state facts

constituting a valid cause of action in equity against the defendants or any of them; that on the facts s ated in said bill the Court has no jurisdiction of the cause; and that the defendants recover their costs herein of the plaintiffs; to which order, judgment and decree of the Court, and every part thereof, the plaintiffs except.

HOLLISTER, *Judge.*

104 And afterwards, to-wit: on the 9th day of November, A. D. 1918, a Petition for Appeal was filed in the Clerk's Office of said Court in this cause, which said Petition for Appeal is clothed in the words and figures following, to-wit:

Petition for Appeal.

In the United States District Court, Southern District of Ohio, Eastern Division.

No. 106.

I. Tucker Burr, Winthrop Burr, A. Lawrence Pierson, Thomas B. Gammett, Jr., Constantine Hutchins, Richard Austin, James W. Wheeler, and William J. Sturgis, Partners Doing Business under the Firm Name and Style of Parkinson & Burr, Plaintiffs,

vs.

The City of Columbus, Ohio, a Municipal Corporation of the State of Ohio; George J. Karb, Mayor of said City; Henry L. Scarlett, City Attorney and City Solicitor of said City; James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck, and Fred F. Zimpfer, Members of the City Council of said City, Defendants.

Petition for Appeal.

The above named plaintiffs conceiving themselves aggrived by the order, judgment and decree entered on the 9th day of November, 1918, in the above entitled cause, hereby appeal from said order, judgment and decree to the Supreme Court of the United
105 States, and they pray that this their appeal may be allowed; and that a transcript of the record and proceedings and papers, including the opinion of the Court, upon which said order, judgment and decree *was* made, duly authenticated, may be sent to the Supreme Court of the United States.

WILLIAM O. HENDERSON,
HENRY J. BOOTH,
HENDERSON & BURR, and
BOOTH, KEATING, POMERENE & BOULGER,
Solicitors for said Plaintiffs and Appellants.

JOSEPH S. CLARK,
HENRY A. McCARTHY,
Of Counsel.

And afterwards, to-wit: on the 9th day of November, A. D. 1918, an Assignment of Errors was filed in the Clerk's Office of said Court in this cause, which said Assignment of Errors is clothed in the words and figures following, to-wit:

106 *Assignment of Errors.*

In the United States District Court, Southern District of Ohio, Eastern Division.

No. 106.

I. TUCKER BURR, WINTHROP BURR, A. LAWRENCE PIERSON, THOMAS B. GAMMETT, JR,. Constatntine Hutchins, Richard Austin, James W. Wheeler, and William J. Sturgis, Partners Doing Business under the Firm Name and Style of Parkinson & Burr, Plaintiffs,

vs.

THE CITY OF COLUMBUS, OHIO, a Municipal Corporation of the State of Ohio; George J. Karb, Mayor of said City; Henry L. Scarlett, City Attorney and City Solicitor of said City; James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck and Fred F. Zimpfer, Members of the City Council of said City, Defendants.

Assignment of Errors.

The above named plaintiffs and appellants now come and make and file this their assignment of errors:

(1) Said District Court erred in dismissing the above entitled cause.

(2) Said Court erred in holding, deciding and decreeing that said cause should be dismissed because the bill does not state facts constituting a cause of action in equity against the defendants or any of them.

(3) Said Court erred in holding, deciding and decreeing
107 that said bill does not state facts constituting a cause of action in equity against the defendants or any of them.

(4) Said Court erred in holding, deciding and decreeing that the facts stated in said bill do not show any federal question for the consideration and decision of the Court.

(5) Said Court erred in holding, deciding and decreeing that said bill does not state any facts which show the Fourteenth Amendment to the Constitution of the United States has been invaded or violated or any right of the plaintiffs under said Amendment has been invaded or violated by the defendants or any of them; and that neither said Amendment nor any right of the plaintiffs thereunder would be invaded or violated by the enforcement by the defendants or any of them of said ordinances mentioned in said bill.

(6) Said Court erred in holding and deciding that said two franchise ordinances mentioned in said bill are respectively contracts which are binding and unalterable, without the consent of the parties thereto, during the terms thereof.

(7) Said Court erred in holding and deciding that said two franchise ordinances each required said The Columbus Railway, Power & Light Company, during the respective terms thereof, to furnish street railway service at the rates of fare therein prescribed.

(8) Said Court erred in holding and deciding that said two franchise ordinances each required said The Columbus Railway, Power and Light Company, during *their* respective terms thereof, to furnish street railway service at the rates of fare therein prescribed, notwithstanding the fact that, by reason of unexpected and changed conditions said rates of fare will not yield sufficient return to said
108 Company to pay its operating expenses, taxes and a proper amount for depreciation of property used in serving the public.

(9) Said Court erred in holding and deciding that said The Columbus Railway, Power and Light Company had not and has not the right to terminate or suspend said two franchise ordinances, or either of them, because of the new conditions resulting from the present war and the increased cost of operation due to said war, which were not foreseen when said ordinances were passed and accepted.

(10) Said Court erred in overruling plaintiff's motion for a temporary restraining order and a preliminary injunction.

(11) Said Court erred in holding, deciding and decreeing that it had and has no jurisdiction in said cause.

(12) Said Court erred in holding and deciding that said bill does not state a case within the jurisdiction of said Court.

(13) Said Court erred in sustaining the motion of the defendants to dismiss this suit.

WILLIAM O. HENDERSON,
HENRY J. BOOTH,
HENDERSON & BURR,
BOOTH, KEATING, POMERENE & BOULGER,
Solicitors for Plaintiff and Appellant The Columbus Railway, Power & Light Company.

JOSEPH S. CLARK,
HENRY A. McCARTHY,
Of Counsel.

109 And afterwards, to-wit: on the 12th day of November, A. D. 1918, an Entry was made on the Journal of said Court in this cause, which said Entry is clothed in the words and figures following, towit:

Entry (2—344).

Order Allowing Appeal.

No. 106.

I. Tucker Burr, Winthrop Burr, A. Lawrence Pierson, Thomas B. Gammett, Jr., Constantine Hutchins, Richard Austin, James W. Wheeler, and William J. Sturgis, Partners Doing Busniess under the Firm Name and Style of Parkinson & Burr, Plaintiffs,

vs.

The City of Columbus, Ohio, a Municipal Corporation of the State of Ohio; George J. Karb, Mayor of said City; Henry L. Scarlett, City Attorney and City Solicitor of said City; James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck, and Fred F. Zimpfer, Members of the City Council of said City, Defendants.

Entry.

And now at this term it appearing that the above named plaintiffs have filed their petition for appeal from the order, judgment and decree herein rendered against them and entered on or about the 9th day of November, 1918, to the Supreme Court of the United States and have also filed their assignment of errors pursuant to the rules of said Supreme Court, it is ordered and adjudged that said appeal from said order, judgment and decree be and the same hereby is allowed and granted as prayed for in said petition for ap-
110 peal, upon the plaintiffs giving their appeal bond to the defendants, with sufficient surety, in the penal sum of five hundred dollars ($500), conditioned for costs on appeal according to law.

HOLLISTER, *J.*

And afterwards, to-wit: on the 12th day of November, A. D. 1918, came the Plaintiffs by their Solicitors and filed in the Clerk's Office of said Court, their certain Appeal Bond in this cause, which said Appeal Bond is clothed in the words and figures following, to-wit:

Appeal Bond.

Know all men by these presents, That we, I. Tucker Burr, Winthrop Burr, A. Lawrence Pierson, Thomas B. Gammett, Jr., Constantine Hutchins, Richard Austin, James W. Wheeler and William J. Sturgis, Partners, doing business under the firm name and style of Parkinson & Burr, as principals, and Maryland Casualty Company, of Baltimore, Maryland, as surety, are held and firmly bound unto The City of Columbus, Ohio; George J. Karb, Mayor of said City; Henry L. Scarlett, City Attorney and City Solicitor of said

City; James J. Thomas, City Clerk of said City; and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck and Fred F. Zimpfer, Members of the City Council of said City in the full and just sum of Five Hundred Dollars, to be paid to the said obligees and their certain attorneys, executors, administrators or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

111 Sealed with our seals and dated this 9th day of November, in the year of our Lord one thousand nine hundred and eighteen.

Whereas, lately at a term of the District Court of the United States for the Southern District of Ohio, Eastern Division, in a suit depending in said Court, between said principals and said obligees a decree was rendered against the said principals and the said principals having obtained an appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said obligee citing and admonishing them to be and appear at a session of the United States Supreme Court to be holden at the City of Washington in the District of Columbia, on the eleventh day of December next.

Now, the condition of the above obligation is such, That if the said principals shall prosecute said appeal to effect, and answer all damages and cost if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

I. TUCKER BURR,
WINTHROP BURR,
A. LAWRENCE PIERSON,
THOMAS B. GAMMETT, JR.,
CONSTANTINE HUTCHINS,
RICHARD AUSTIN,
JAMES W. WHEELER, AND
WILLIAM J. STURGIS,
Partners Doing Business under the Firm Name and Style of Parkinson & Burr.
By KARL E. BURR,
Their Attorney-in-fact.
MARYLAND CASUALTY COMPANY,
By P. R. JOYCE, *Attorney-in-fact.* [SEAL.]

Sealed and delivered in presence of—
R. K. HUNTER.
L. E. DILLON.

Approved by
HOLLISTER, *Judge.*

112 And afterwards, to-wit: on the 13th day of November, A. D. 1918, there was issued a certain Citation, service of same having been acknowledged, which said Citation is clothed in the words and figures following, to-wit:

Citation Issued.

United States Supreme Court.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

To the City of Columbus, Ohio, a Municipal Corporation of the State of Ohio; George J. Karb, Mayor of said City; Henry L. Scarlett, City Attorney and City Solicitor of said City; James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck, and Fred F. Zimpfer, Members of the City Council of said City, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Supreme Court to be holden at the City of Washington on the 11th day of December next, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of Ohio, Eastern Division, wherein I. Tucker Burr, Winthrop Burr, A. Lawrence Pierson, Thomas B. Gammett, Jr., Constantine Hutchins, Richard Austin, James W. Wheeler, and William J. Sturgis, Partners doing business under the firm name and style of Parkinson & Burr are appellants and you are appellees to show cause, if any there be, why the decree rendered against the said appellants as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

113 Witness the Honorable Edward Douglass White Chief Justice of the United States, this twelfth day of November, in the year of our Lord one thousand nine hundred and eighteen, and of the Independence of the United States of America the one hundred and forty-third.

HOLLISTER,
U. S. District Judge for the Southern District of Ohio.

Service of the above citation is hereby acknowledged by appellees, this 13th day of Nov. 1918.

HENRY L. SCARLETT.
City Atty., Counsel for Defts. & Appellees.

114 *Clerk's Certificate.*

THE UNITED STATES OF AMERICA,
Southern District of Ohio, Eastern Division, ss:

I, B. E. Dilley, Clerk of the District Court of the United States, within and for the District and Division aforesaid, do hereby certify

that the foregoing is a true and complete transcript of the proceedings had by and before said Court in the above entitled cause, as the same appears of record and on file in the Clerk's Office of said Court.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, at the City of Columbus, Ohio, this 18th day of November, 1918.

[Seal United States District Court, Southern Dis. Ohio.]

B. E. DILLEY, *Clerk,*
By C. P. WHITE, JR., *Deputy.*

115 United States Supreme Court.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

To The City of Columbus, Ohio, a Municipal Corporation of the State of Ohio; George J. Karb, Mayor of said City; Henry L. Scarlett, City Attorney and City Solicitor of said City; James J. Thomas, City Clerk of said City, and Milton W. Westlake, Louis A. Alcott, Albert E. Griffin, Joseph C. Nailor, Edgar L. Weinland, Arthur P. Lamneck and Fred F. Zimpfer, Members of the City Council of said City, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Supreme Court, to be holden at the City of Washington on the* 11th day of December, next, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of Ohio, Eastern Division, wherein I. Tucker Burr, Winthrop Burr, A. Lawrence Pierson, Thomas B. Gammett, Jr., Constantine Hutchins, Richard Austin, James W. Wheeler and William J. Sturgis, Partners doing business under the firm name and style of Parkinson & Burr are appellants and you are appellees to show cause, if any there be, why the decree rendered against the said appellants as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, this twelfth day of November, in the year of our Lord one thousand nine hundred and eighteen, and of the Independence of the United States of America the one hundred and forty-third.

HOLLISTER,
U. S. District Judge for the Southern District of Ohio.

*Not exceeding 30 days from the day of signing.

Service of the above citation is hereby acknowledged by appellees, this 13th day of Nov. 1918.

HENRY L. SCARLETT,
City Atty., Counsel for Defts. & Appellees.

116 [Endorsed:] Citation and Acknowledgment of Services thereof. Filed Nov. 13, 1918, 10.15 a. m. B. E. Dilley Clerk.

Endorsed on cover: File No. 26825. S. Ohio D. C. U. S. Term No. 739. I. Tucker Burr et al., partners, doing business under the firm name and style of Parkinson & Burr, appellants, vs. The City of Columbus, Ohio, et al. Filed November 20th, 1918. File No. 26825.